

Moore, Tania

From: Fikes, Cathy
Sent: Tuesday, January 17, 2023 1:03 PM
To: Agenda Alerts
Subject: FW: Letter in Opposition to Agenda Item 21 (January 17, 2023)
Attachments: 23.01.17 Huntington Beach Anonymous Complaint Letter Final.pdf

From: Peter Eliasberg <PEliasberg@aclusocal.org>
Sent: Tuesday, January 17, 2023 12:44 PM
To: CITY COUNCIL <city.council@surfcity-hb.org>
Subject: Letter in Opposition to Agenda Item 21 (January 17, 2023)

Honorable Members of the City Council:

Please see the attached letter from the ACLU of Southern California and the First Amendment Coalition opposing agenda item 21 on the agenda for today's City Council meeting.

Sincerely,
Peter Eliasberg

Peter Eliasberg
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The ACLU: Because Freedom Can't Protect Itself

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**SUPPLEMENTAL
COMMUNICATION**

Meeting Date: 1/17/2023

Agenda Item No.: #21 (23-017)



January 17, 2022

Via E-Mail

Mayor Tony Strickland
Mayor Pro Tem Gracey Van Der Mark
Council Member Pat Burns
Council Member Casey McKeon
Council Member Dan Kalmick
Council Member Natalie Moser
Council Member Rhonda Bolton

Re: Opposition to Agenda Item Number 21 (January 17, 2023)

Honorable Members of the City Council:

The ACLU of Southern California and First Amendment Coalition strongly oppose agenda item number 21, the proposed city ordinance barring anyone from making anonymous complaints about businesses to Code Enforcement. Unfortunately, the proposed ordinance suffers from the very constitutional flaws we anticipated when we submitted a letter last month in opposition to the agenda item calling for the City Attorney to draft this ordinance.

The proposed ordinance barring anonymous complaints raises serious constitutional concerns about the right to petition and the right to anonymous speech, both of which are protected by the First Amendment to the Constitution. Moreover, the ostensible justification for the ordinance – that it is consistent with the Sixth Amendment’s right for defendants to be able to face their accusers – betrays a fundamental misunderstanding of the protections of the Sixth Amendment and the rights of the accused.

EXECUTIVE DIRECTOR Hector O. Villagra

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CHAIRS EMERITI Marla Stone Shari Leinwand Stephen Rohde Danny Goldberg Allan K. Jonas* Burt Lancaster* Irving Lichtenstein, MD* Jarl Mohn Laurie Ostrow* Stanley K. Sheinbaum*

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ANALYSIS

The rationale the Council previously provided as a basis to ask the City Attorney to draft a proposed ordinance to bar anonymous complaints to Code Enforcement was that it is supported by the Sixth Amendment's right of a defendant to face their accuser. This association misunderstands the protections of the Sixth Amendment.

The Confrontation Clause of the Sixth Amendment gives "the accused. . . the right to be confronted with the witnesses against him" in their criminal trial. U.S. Const. amend. VI. But the neither the Sixth Amendment or any other provision of the Constitution prohibits a law enforcement agency or any governmental actor from *initiating an investigation* based on a complaint of wrongdoing from someone who submits an anonymous complaint. Indeed, the Constitution permits law enforcement agents to execute an investigatory stop of a person based on an anonymous tip so long as the tip has sufficient indicia of reliability. See *Navarette v. California*, 572 U.S. 393, 397 (2014) (quoting *Alabama v. White*, 496 U.S. 325, 330 (1990)) ("But under appropriate circumstances, an anonymous tip can demonstrate 'sufficient indicia of reliability to provide reasonable suspicion to make [an] investigatory stop.'")

Law enforcement and other government agencies routinely rely on anonymous tips as the basis to initiate investigations of potential crimes and other legal violations. The need to rely on anonymous complaints as a basis to initiate investigations is particularly great where an agency is leanly staffed and relies on complaints to perform its enforcement obligations.

If an anonymous tip leads to an enforcement officer to conclude a business has violated a code provision and the initiation of a proceeding against that business, then due process requires that the business be provided with the evidence supporting the code officer's conclusions. But the fact that the code officer may have initiated his or her investigation in response to an anonymous complaint raises no due process or other constitutional concerns.

By contrast, barring citizens from making anonymous complaints to a government agency raises significant constitutional concerns. The right of the people to petition government "is one of the freedoms protected by the Bill of Rights." *E.R.R. Presidents Conf. v. Noerr Motor Freight, Inc.* 365 U.S. 127, 138 (1961). Indeed, it is "among the most precious of the liberties safeguarded by the Bill of Rights." *United Mine Workers v. Illinois Bar Ass'n*, 389 U.S. 217, 222 (1967). "The right to petition traces its origins to Magna Carta, which confirmed the right of barons to

petition the King.” *Borough of Duryea, Pa. v. Guarnieri*, 564 U.S. 379, 395 (2011). The right applies to all levels of government, including the right to file a complaint with a municipality’s code enforcement agencies. See *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972). Therefore, “[p]rivate citizens have the fundamental right to present concerns to government agencies.” *Evans v. Evans*, 162 Cal. App. 4th 1157, 1172 (2008).

The First Amendment also protects the right of anonymous speech. Courts have repeatedly invalidated provisions that burden the ability of persons to express themselves anonymously. See, e.g., *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 342 (1995) (invalidating law requiring election literature to include name and address of person issuing the literature); *Talley v. California*, 362 U.S. 60 (1962) (holding that ordinance that bars distribution of handbills that do not contain the name and address of the person who printed, wrote, or compiled the material violates the First Amendment right to anonymous speech).

There are myriad reasons why the courts have held that the First Amendment protects anonymous speech. For example, the right to speak anonymously protects people who fear that they will be retaliated against for protesting about the actions of others. Cf. *Talley*, 362 U.S. at 64. These concerns apply equally to “the rights of speech and petition,” which are “cognate rights” under the First Amendment that “share substantial common ground.” *Borough of Duryea*, 564 U.S. at 388.

There are obvious reasons why business owners might be afraid of identifying themselves when complaining to a code enforcement agency that a neighboring business is illegally selling cannabis or complaining to city officials that a local bar is illegally operating after hours. Similarly, an employee may well refrain from filing a valid complaint that their employer is violating federal or state laws requiring accommodation of people with disabilities if they cannot do so anonymously for fear of losing their job. In sum, barring anonymous complaints will almost certainly chill many people from filing complaints even when those complaints of illegal activity are well-founded. *Talley*, 362 U.S. at 64 (“Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all.”). Thus, refusing to allow people to submit anonymous complaints to code enforcement when they believe a business may be violating the law substantially burdens the right to petition and anonymous speech.¹

¹ It is not clear from the ordinance exactly how the form must be submitted. But if it requires submission of complaints in person at City Hall – as was called for December 20, 2022 Agenda

In an analogous circumstance, the California Attorney General concluded that the interpreting a law to forbid police agencies from investigating citizen complaints when the complaint is unsigned raised significant constitutional concerns. 79 Ops. Cal. Atty. Gen. 163 at 4-5 (1996).

To the extent the Council is concerned that some complaints are unfounded or politically motivated, the appropriate response is to instruct code officers to evaluate whether complaints have sufficient indicia of reliability to justify initiating an investigation, not to burden the constitutional rights of anyone to make an anonymous complaint.²

CONCLUSION

For the foregoing reasons, we urge the Council to vote to reject the ordinance because it raises significant constitutional concerns and may subject the city to legal action.

Sincerely,



Peter J. Eliasberg
Chief Counsel
ACLU Foundation
of Southern California

David Loy
Legal Director
First Amendment Coalition

Item Report, it would further impede the exercise of constitutional rights and present substantial questions whether it violates the right of persons with disabilities or others unable to appear at City Hall.

² The statement in the Items Report that some business that were subject to unfounded complaints were pressured "to make corrections and/or face fines because of the basis of anonymous complaints" is unpersuasive. If the businesses were not violating code provisions, they had no corrections to make and should not have been subject to any fines, which would be triggered only by code violations.