



## MEMORANDUM

**TO:** Mayor Diane Wolfe Marlin and City Council Members  
**FROM:** Carol Mitten, City Administrator  
**DATE:** February 11, 2021  
**SUBJECT:** An Ordinance Amending Urbana City Code Chapter 12 (Exceptions to the Human Rights Ordinance)

**Introduction:** This memo is a follow-up to the item that was presented at the Committee of the Whole on January 19, 2021.

The Human Rights Ordinance (HRO) is not explicit as to whether the City of Urbana is subject to the jurisdiction of the Human Relations Commission (HRC), although historically the HRO has normally been interpreted as exempting the City from the Ordinance. There are two issues that have arisen as a result of this ambiguity. **#1:** The first issue is that there are pending cases filed under the existing Ordinance that cannot be resolved without clarification of the existing Ordinance. **#2:** The second issue is whether the Council wants to change the existing Ordinance going forward as it relates to the issue of the HRC's jurisdiction over the City.

The relevant language from Urbana City Code is:

From Section 12-39. – Definitions

*Employer.* Any **person** who, for compensation, employs any individual...

*Person.* One or more individuals, labor unions, employers, employment agencies, partnerships, associations, creditors, corporations, cooperatives, legal representatives, **government agency**, trustees, owner, or any agent or representative of the foregoing.

From Section 12-105(d):

The provisions of this article shall not apply to **other** units of government, including the Federal government or any of its agencies, the State of Illinois and any other political subdivision, municipal corporation or their agencies.

**Emphasis added.**

Over the years, there has been near unanimity among staff and HRC members that the language is ambiguous, even though there may have been differences of opinion about how to resolve the ambiguity. In delineating the issues below, I am trying to make a distinction between deciding

what the Ordinance currently says and deciding what you want the Ordinance to say going forward.

**Discussion:**

**ISSUE #1 – Pending Cases**

As you know, on November 10, 2020, an informal hearing body comprised of one member of the HRC and two lay-persons found, as to Complaint 001-09-20, that the HRC has jurisdiction and that there is probable cause that the Respondents violated the Human Rights Ordinance. The Respondents in that complaint are Elizabeth Hannan (HR/Finance Director for the City of Urbana), Liz Borman (HR Manager), and the three members of the Civil Service Commission. The City Attorney, Jim Simon, served as the investigating officer for the case. The members of the Civil Service Commission, and City staff (including Ms. Hannan and Ms. Borman) are all considered to be agents who act on behalf of “the City”. This, in turn, made the City itself a respondent to the complaint.

As noted above, prior to the November 10 hearing, all other occasions when the issue of the HRC’s jurisdiction over the City itself has come up, there has never been a finding that jurisdiction existed.<sup>1</sup>

Subsequent to the informal hearing body finding on November 10 that the HRC did have jurisdiction, the practical difficulties and conflicts of interest that result from reading the Ordinance as placing the City under its jurisdiction began to evidence themselves and, almost immediately, the process began to break down. Setting aside the problem that a final order was never issued by the informal committee, the next step in the normal course of such a complaint would be an attempt at conciliation. Normally, the Human Relations and Equity Officer (HREO) would be the convener of the conciliation. In this case, Elizabeth Hannan has been handling the HREO duties related to the HRC. She is one of the Respondents, which creates an obvious conflict of interest as both parties to a complaint are entitled to have a neutral third party who has no personal stake in the outcome act as mediator. Even if the person serving as the HREO was not named as a respondent, having a member of City staff act as mediator when the City is a respondent creates an “appearance of impropriety” i.e., that the neutral party actually may have a vested interest in the matter or an allegiance to one party in particular.

Since the acting HREO was conflicted out in Complaint 001-09-20, City administration was approached by the Chair and Vice Chair of the HRC. In an attempt to facilitate the process in light of the conflict, they suggested that they might be designated to oversee the conciliation. However, in exploring this option, it became clear that having members of the HRC oversee the conciliation would create another set of problems. First, the HRC is meant to remain an unbiased body that does not fully explore and address the merits of a matter outside of a public hearing. While a conciliation is not meant to be a fact-finding event, the underlying facts of the matter, or at least the parties’ perspectives on events, are openly discussed. What would occur would be a free-form discussion absent any application of formal process or evidentiary standards. This would “taint” the future adjudication of the matter and renders the hearing process and its rules of order useless. Moreover, the very nature of the conciliation process means that members of the hearing body would meet separately with the parties on one or more

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<sup>1</sup> Prior complaints in which the City was named as a respondent were all resolved through other means without the actual question of jurisdiction being clearly addressed and decided (e.g., withdrawing of the complaint, informal mediation).

occasions. This creates an *ex parte*<sup>2</sup> dynamic. Fair and neutral triers of fact are forbidden from having *ex parte* communications of any substance with either party. To do so would violate the fundamental principles of due process and fair hearings. The Chair and Vice Chair agreed that this would be problematic and that they could not participate.

Perhaps the most obvious illustration of the inherent conflict is in something as simple as the name of the pending matter. Historically, when matters have proceeded to a formal hearing, the City assumes the role of prosecuting the matter. The City makes itself a party to the case and assumes prosecutorial responsibilities, much in the same way that victims rely on the State's Attorney's Office to prosecute crimes, as opposed to the victim bringing criminal matters to trial themselves. Thus, in a formal hearing, the caption of the case would literally be "City of Urbana v. City of Urbana" in the event that the complaint came to a hearing of the full HRC.

And, finally, in addition to now acting on behalf of the complainant as required under Section 12-84(b)(2), City legal staff are representing the respondents.<sup>3</sup> Bear in mind that at all points prior to formal hearing (at which point a hearing officer is often retained to assist the HRC in evidentiary rulings), City legal staff will have acted as attorney and advisor for the HRC and the HRC. Therefore, in a matter where the City was made respondent to a case, City legal will have acted as counsel for all parties in the matter, creating a profound conflict of interest for City legal staff and a clear appearance of impropriety that any complainant would have cause to challenge. In the event the complainant did not like the ruling of the HRC and appealed the matter for judicial review to the Circuit Court pursuant to Section 12-102, this tainted process, rife with its *ex parte* communications and inherent conflicts of interest would very likely make the hearing and its findings subject to judicial scrutiny that it very likely might not survive.

It may have been possible to engage an outside mediator and/or outside counsel in order to deal with the conciliation and/or formal hearing, but the current ordinance and procedures do not give any clear instructions on how to do this, developing such procedures would be a non-trivial task, and staff feels that even if we were to do so, it is unlikely that we would be able to avoid all of the conflicts of interest.

Needless to say, these eventualities are what have led to the impasse in resolving Complaint 001-09-20.

In deciding what the Ordinance currently means, it is relevant to consider the path of least resistance as the most likely resolution. One should consider the unanticipated financial implications of putting the City under the HRC's jurisdiction without the organizational resources to support it.

## **ISSUE #2 – Possible Ordinance Changes**

As I mentioned in my January 14, 2021 memo, the HRC, at its meeting on January 13, 2021, passed a Resolution (see attached) to recommend that the Council clarify the question of their jurisdiction over the City of Urbana, without taking a position as to whether the City should or should not be subject to the provisions of the HRO. To elaborate, the HRC offered specific amendments to City Code Chapter 12

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<sup>2</sup> Means, "from only one side of a dispute, without notice to or the presence of the other party." This is problematic because the HRC itself is the ultimate adjudicatory body.

<sup>3</sup> The City, through its legal representatives, is obligated under Article IX of the City Code to defend its employees and elected and appointed officials from all claims brought against them while acting in their official city capacity (other than criminal actions or willful misconduct).

that would either 1) Clearly Include Urbana to Being a Respondent or 2) Clearly Exclude Urbana from Being a Respondent.

If Urbana Could be a Respondent In the event that Urbana could be a Respondent in a complaint that would be subject to the procedural jurisdiction of the HRC, the HRC Resolution included a number of proposed language changes in an effort to clarify that. The HRC recognized the need to hire independent staff to assist in the investigation of the case. As in several of the cases we have had of late, staff supporting the HRC have themselves been the subject of complaints. The HRC Resolution added a new Section 12-85 – Conflicts of Interest, to try and address this concern (among a broader array of possible conflicts). The proposed new section reads as follows:

*In cases where the human relations officer or the city attorney have a conflict of interest in performing the duties of this division, they may designate another person to perform these duties. If the designee is not an employee of the City of Urbana, the City shall be responsible for paying the costs of such designee.*

The HRC also offered some language modifications to deal with enforcing the Commission's orders after a case has been decided, with modifications to Section 12-103(c) and a new Section 12-103(d). The revised sections would read as follows:

Section 12-103(c):

*The city attorney, or their designee as described in section 12-103(d), shall institute, in the name of the City of Urbana, or the name of the commission in cases where the City of Urbana or any agent or representative thereof is the respondent to a complaint, civil proceedings, including the seeking of such restraining orders and temporary or permanent injunctions, as are necessary to obtain complete compliance with the commission's orders.*

Section 12-103(d):

*In cases where the City of Urbana or any agent or representative thereof is the respondent to a complaint, the city attorney will designate an independent outside attorney to perform the responsibilities in this section. The City of Urbana shall be responsible for paying the cost of such designee.*

A remaining unresolved issue would be the prosecution of any cases in Ordinance Violation (OV) Court. If the HRC were to find against the City as a respondent, and the City were to refuse to comply, simply designating an outside counsel to prosecute the case would not be enough. Private-party disputes are not adjudicated in OV Court; only ordinance violations prosecuted by the City go into OV Court. There remains an unresolved question as to the forum in which these orders would be enforced.

While these efforts to hire outside staff (i.e., outside counsel and/or outside investigator) might move in the direction of creating an ethical wall, they will not completely succeed for those members of the public who distrust the government. The services of such individuals will still be procured, paid for, and supervised by City staff. Also, changing the name of the prosecutor from the City to the HRC is a semantics exercise and does not change the fact that the HRC is also an agent of the City and the City would still fundamentally be prosecuting itself.

Councilmembers asked for an estimate of how much some of these efforts might cost. I offer the following information as benchmarks:

Electoral Board (Heyl/Royster) (may increase due to PAC appeals)	\$17,745
Budget for HREO Hearings (originally \$2,000; increased due to volume of CPRB cases)	\$20,000

In each case noted above, these costs are for hearing officers only. They do not include the cost of separate legal counsel to prosecute a case or separate investigative staff. I think one could safely assume that a factor of three would apply on average. Complex cases could be far more. The volume of cases would be a factor, as well.

One way to largely (but not completely) resolve these conflicts would be to create an entirely independent Office of Human Rights. In such a model, the funding would be provided by the City, but the Human Rights and Equity Officer (HREO) would answer to the Human Relations Commission members. This would place a greater burden on the Commission members to conduct a hiring process from time to time and to provide oversight of the HREO and the counsel. Based on current salaries and benefits alone for just the HREO and a part-time attorney, the cost for this option would approximate \$200,000. Whether that staffing level would be sufficient and whether they would need to rent outside office space would remain to be seen. The issue of prosecution in OV Court would still remain as an issue to be resolved, as we have yet to identify a good model for how a municipality simultaneously prosecutes and defends itself in circuit court. Hiring an outside attorney to act as a “special prosecutor” might partially resolve a personal conflict of interest an employee of the City might have in suing the City, but it would not change the fact that both the plaintiff and the defendant in the actual case that has now been brought into state court is the City.

If Urbana Could not be a Respondent As in the preceding discussion related to Issue #1, the HRC Resolution included proposed language changes to clarify the jurisdictional issue to exclude the City.

**Recommendation:** It is important that we be able to resolve the pending cases, and we cannot do that without clarifying the meaning of the existing Ordinance. I believe that the intent of the Ordinance *as it was written* was that the City would not be subject to the jurisdiction of the HRC. This is position appears to be borne out not only by past practices of the HRC in handling these matters, but also by the lack of procedural guidance in the HRO. Prior discussions regarding the need to clarify the Ordinance have occurred periodically throughout the years, but were not pursued at those times due to a lack of staffing resources. The draft Ordinance would accomplish that.

In the event that the Council wants to change the jurisdiction of the HRC, there are clear financial implications. Given the tenuous revenue situation at present due to the on-going effects of the pandemic, I would suggest that this issue be considered in the context of the budget should a majority of the members want to expand the HRC’s jurisdiction. Additionally, the matter of enforcement against the City by the City is one that must be addressed.

Attachments: Draft Ordinance  
HRC Resolution

**ORDINANCE NO. 2021-~~xx~~-~~xxx~~**

**AN ORDINANCE AMENDING URBANA CITY CODE CHAPTER 12**

**(Exceptions to the Human Rights Ordinance)**

**WHEREAS**, the City Council of the City of Urbana (“City Council”) desires to amend the Urbana Human Rights Ordinance to clarify the jurisdiction of the Human Relations Commission; and

**WHEREAS**, the current language of the Human Rights Ordinance is not explicit as to whether the Human Relations Commission’s has jurisdiction over the City and its employees or agents; and

**WHEREAS**, this jurisdictional issue, if not clarified, would result in the City being put in the position of simultaneously prosecuting and defending itself; and

**WHEREAS**, the Human Relations Commission has also recognized that clarification is required and has passed a resolution requesting that the City Council clarify the Human Rights Ordinance as to the Human Relations Commission’s jurisdiction; and

**WHEREAS**, the City Council desires to clarify that the City, its employees and agents are not subject to the Human Rights Ordinance.

**NOW, THEREFORE, BE IT ORDAINED** by the City Council of the City of Urbana, Illinois, as follows:

**Section 1.**

Urbana City Code Chapter 12, “Human Rights,” Article I, “In General” is hereby amended by adding Section 12-1 that shall read as follows (added language is underlined):

**Sec 12-1. – Commitment**

The City of Urbana shall conform to the requirements of Article III, Division 2 of this Chapter (sections 12-61 through 12-80) in its own employment practices and the provision of city services to the public.

**Section 2.**

Urbana City Code Chapter 12, “Human Rights,” Article II, “Commission on Human Relations,” Section 12-22 – Duties; cooperation with city offices.” is hereby amended by adding subsection (g) that shall read as follows (added language is underlined):

Sec. 12-22. – Duties; cooperation with city offices.

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(g) The Commission shall receive any reports by individuals who believe that the City of Urbana is engaged in a discriminatory practice as defined in Article III, Division 2 of this Chapter. The commission shall review such reports and work with the mayor, city council, city departments, agencies, and officials in order to correct any discrimination that may exist. The commission shall notify the public of the outcome. The herein described procedure is in lieu of the compliant procedures, investigation, mediation, and enforcement proceedings articulated in Divisions 3 and 4 of this ordinance as the City is not subject to those provisions.

### **Section 3.**

Urbana City Code Chapter 12, “Human Rights,” Article III, “Discrimination,” Division 1, “Generally,” Section 12-39, “Definitions” is hereby amended as follows, with added language underlined and deleted language shown in ~~strike through~~:

Sec. 12-39. – Definitions.

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*Person.* One or more individuals, labor ~~unions~~organizations, employers, employment agencies, partnerships, associations, creditors, corporations, cooperatives, ~~legal representatives, government agency,~~ trustee, owners, or any agent or representative or any of the foregoing.

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### **Section 4.**

Urbana City Code Chapter 12, “Human Rights,” Article III, “Discrimination,” Division 4, “Administration and Enforcement,” Section 12-105, “Exceptions” is hereby amended by the deletion shown with a ~~strike out~~ to subsection (d) and by adding a subsection (e) underlined as follows:

Sec. 12-105. - Exceptions.

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(d) The provisions of this article shall not apply to ~~other~~ units of government, including the Federal government or any of its agencies, the State of Illinois and any other political subdivision, municipal corporation or their agencies, including the City of Urbana.

### **Section 5.**

Those sections, paragraphs, and provisions of the Urbana City Code that are not expressly amended or repealed by this Ordinance are hereby re-enacted, and it is expressly declared to be the intention of this Ordinance not to repeal or amend any portions of the Urbana City Code other than those expressly set forth as amended or repealed in this Ordinance. The invalidity of any section or provision of this Ordinance hereby passed and approved shall not invalidate other sections or provisions thereof.

**Section 6.**

This Ordinance shall not be construed to affect any suit or proceeding pending in any court, or any rights acquired, or a liability incurred, or any cause or causes of action acquired or existing prior to the effective date of this Ordinance; nor shall any right or remedy of any character be lost, impaired, or affected by this Ordinance.

**Section 7.**

The City Clerk is directed to publish this Ordinance in pamphlet form by authority of the corporate authorities, and this Ordinance shall be in full force and effect from and after its passage and publication in accordance with Section 1-2-4 of the Illinois Municipal Code.

This Ordinance is hereby passed by the affirmative vote, the “ayes” and “nays” being called, of a majority of the members of the Council of the City of Urbana, Illinois, at a meeting of said Council.

**PASSED BY THE CITY COUNCIL** this date day of Month, Year.

AYES:

NAYS:

ABSTENTIONS:

\_\_\_\_\_  
Phyllis D. Clark, City Clerk

**APPROVED BY THE MAYOR** this date day of Month, Year.

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Diane Wolfe Marlin, Mayor



A RESOLUTION RECOMMENDING THE AMENDMENT OF CITY CODE CHAPTER 12

WHEREAS the Urbana Human Relations Commission has discovered ambiguities in the Urbana Human Rights Ordinance in the course of its handling of complaints; and

WHEREAS the Urbana Human Rights Ordinance is ambiguous with regard to whether the City and its representatives are subject to the complaint process described in Article III of the Human Rights Ordinance; and

WHEREAS the Urbana Human Relations commission wishes the City and its representatives not to discriminate in its employment practices and provision of services to the public.

NOW, THEREFORE, BE IT RESOLVED BY THE HUMAN RELATIONS OF THE CITY OF URBANA, ILLINOIS, as follows:

**Section 1.** That it is recommended that the City Council clarify City Code Chapter 12 to indicate that the City and its representatives either is or is not subject to Article III of the Human Rights Ordinance by amending the Human Rights Ordinance with one of the following:

A. Changes to Clearly Include Urbana to Being a Respondent

UCC 12-39:<sup>1</sup>

*Employer.* One or more individuals, partnerships, associations, corporations, cooperatives, trustees, owners, or the government of the City of Urbana, including any agent or representative of any of the foregoing, ~~Any person~~ who, for compensation, employs any individual except for the employer's parents, spouse or children; or who employs domestic servants engaged in and about the employer's household.

*Employment agency.* One or more individuals, partnerships, associations, corporations, cooperatives, trustees, owners, or the government of the City of Urbana, including any agent or representative of any of the foregoing, ~~Any person~~ regularly undertaking or attempting, with or without compensation, to procure employees for an employer or to procure for employees the opportunity to work for an employer, ~~including any agent of such a person.~~

*Owner.* One or more individuals, partnerships, associations, corporations, cooperatives, trustees, or the government of the City of Urbana, including any agent or representative of any of the foregoing, ~~Any person~~ who holds legal or equitable title to, or owns any beneficial interest in, any real property or who holds legal or equitable title to a share of, or holds any beneficial interest in, any real estate cooperative which owns any real property.

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<sup>1</sup> In addition to clearly excluding the City of Urbana, the changes here are also to avoid circular definitions that appear in the current ordinance.

*Person.* One or more individuals, labor ~~unions~~ organizations, employers, employment agencies, partnerships, associations, creditors, corporations, cooperatives, ~~legal representatives, government agency,~~ trustees, owners, the government of the City of Urbana, or any agent or representative of any of the foregoing.

*Public accommodations.* All places, businesses or ~~individuals~~ persons offering goods, services (including governmental services) or accommodations to the general public.

UCC 12-63:

(1) *Generally.*

- (a) It shall be an unlawful practice to do any of the following acts wholly or partially for a reason based on discrimination: To deny, directly or indirectly, or charge a higher price than the regular rate, for the full and equal enjoyment of the goods, services, facilities, privileges, advantages and accommodations of any ~~place of~~<sup>2</sup> public accommodation; to print, circulate, post, mail, or otherwise cause, directly or indirectly, to be published a statement, advertisement or sign which indicates that the full and equal enjoyment of the goods, services, facilities, privileges, advantages or accommodations of a ~~place of~~ public accommodation will be refused, withheld from or denied an individual; or that an individual's patronage of, or presence at, a ~~place of~~ public accommodation is objectionable, unwelcome, unacceptable or undesirable. [...]

UCC 12-81:

- (a) Any individual who believes that he or she has been aggrieved by a violation of the provisions of this article may file a complaint with the commission or officer. An individual seeking compensatory damages must file a complaint with the ~~human relations~~ officer. The officer shall keep records of all complaints made to the human relations office, whether or not a formal complaint has been filed.

#### New Section – UCC 12-85 – Conflicts of interest

In cases where the human relations officer or the city attorney have a conflict of interest in performing the duties of this division, they may designate another person to perform these duties. If the designee is not an employee of the City of Urbana, the city shall be responsible for paying the costs of such designee.

UCC 12-103:

- (b) If the commission determines that the respondent(s) have not, after thirty (30) calendar days following service of its order, corrected the unlawful practice and

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<sup>2</sup> It might make sense to remove "place of" in any event, but it certainly makes no sense for governmental services.

complied with this article, the commission shall certify the matter to the city attorney, or their designee as described in section 12-103(d), for enforcement proceedings.

(c) The city attorney, or their designee as described in section 12-103(d), shall institute, in the name of the City of Urbana, or the name of the commission in cases where the City of Urbana or any agent or representative thereof is the respondent to a complaint, civil proceedings, including the seeking of such restraining orders and temporary or permanent injunctions, as are necessary to obtain complete compliance with the commission's orders.

~~(c)~~(d) In cases where the City of Urbana or any agent or representative thereof is the respondent to a complaint, the city attorney will designate an independent outside attorney to perform the responsibilities in this section. The City of Urbana shall be responsible for paying the costs of such designee.

UCC 12-105:

(d) The provisions of this article shall not apply to units of government other than the City of Urbana, including the Federal government or any of its agencies, the State of Illinois and any other political subdivision, municipal corporation or their agencies.

B. Changes to Clearly Exclude Urbana from Being a Respondent:

UCC 12-39:

*Employer.* One or more individuals, partnerships, associations, corporations, cooperatives, trustees, or owners, including any agent or representative of any of the foregoing, Any person who, for compensation, employs any individual except for the employer's parents, spouse or children; or who employs domestic servants engaged in and about the employer's household.

*Employment agency.* One or more individuals, partnerships, associations, corporations, cooperatives, trustees, or owners, including any agent or representative of any of the foregoing, Any person regularly undertaking or attempting, with or without compensation, to procure employees for an employer or to procure for employees the opportunity to work for an employer, ~~including any agent of such person.~~

*Owner.* One or more individuals, partnerships, associations, corporations, cooperatives, or trustees, including any agent or representative of any of the foregoing, Any person who holds legal or equitable title to, or owns any beneficial interest in, any real property or who holds legal or equitable title to a share of, or holds any beneficial interest in, any real estate cooperative which owns any real property.

*Person.* One or more individuals, labor ~~unions~~organizations, employers, employment agencies, partnerships, associations, creditors, corporations, cooperatives, legal

~~representatives, government agency, trustees, owners,~~ or any agent or representative of any of the foregoing.

UCC 12-105:

- (d) The provisions of this article shall not apply to ~~other~~ units of government, including the Federal government or any of its agencies, the State of Illinois and any other political subdivision, municipal corporation or their agencies.

**Section 2.** That, in the case that the City Council clarifies City Code Chapter 12 to indicate that the City and its representatives are not subject to Article III of the Human Rights Ordinance, it is recommended that the City Council ensure the commitment of the city not to discriminate in its employment practices and provision of services to the public by adding the following to the Human Rights Ordinance:

“It is the intent and commitment of the City of Urbana to conform to the requirements of Article III Division 2 of this Chapter (Sections 12-61 through 12-80) in its own employment practices and provision of city services to the public. Any individual who believes that the City of Urbana is engaged in a discriminatory practice as defined in Article III Division 2 may report their concern to the commission. The commission shall review the report, work with the mayor, city council, city departments, agencies and officials in accordance with section 12-22 in order to correct any discrimination that may exist, and report the outcome to the public.”