

SUNSHINE ORDINANCE
TASK FORCE



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June 2, 2009

San Francisco Ethics Commission
25 Van Ness Avenue, Suite 220
San Francisco CA 94102

Regarding: #09007 complaint of David Larkin, and the April 28, 2009 Order of Determination from the Sunshine Ordinance Task Force against the Department of Public Works for failure to respond to a request for documents.

Through two hearings before the SOTF and one hearing before the SOTF Compliance and Amendments Committee, the following facts have been found by the Task Force:

1. On January 7 2009, David Larkin requested information about an investigation conducted by the Department of Public Works in response to Mr. Larkin's complaint against a DPW employee.
2. Sometime after that date, DPW provided responsive documents, but informed Mr. Larkin that they were withholding an unidentified number of documents, including drafts and other unspecified documents, based in part on California Public Records Act section 6254(c) and Article 1 section 1 of the California Constitution.
3. On January 27, Mr. Larkin filed a complaint with the SOTF against DPW.
4. The complaint was initially heard by the Task Force on April 28, 2009::
 - As an initial matter, DPW did not send a representative to the hearing. Mr. Frank Lee had requested a continuance on the matter because he was unavailable on April 28, 2009. The Task Force Administrator informed Mr. Lee and Mr. Lee's supervisor that because the complainant did not agree to the continuance, the issue of whether to grant DPW a continuance would have to be decided by the full Task Force at the April 28, 2009 meeting and that DPW should send a representative to the hearing. No representative was sent. However, given the written record on the complaint, including the correspondence exchanged between DPW and Mr. Larkin, and the lack of disputed facts the Task Force believed they could decide the matter and proceeded with the hearing.

5. At the April 28, 2009 hearing, the Task Force found:
 - DPW impermissibly withheld the preliminary drafts identified in DPW's correspondence. Under section 67.24(a) (1) of the Ordinance, drafts are not exempt from disclosure and must be released, in whole or in part, if maintained by a Department. The Task Force also found that under controlling CPRA case law (*e.g.*, *Bakersfield City Sch. Dist. v. Superior Court* (2004) 118 Cal. App. 4th 1041) where "complaints of a public employee's wrongdoing and resulting disciplinary investigation reveal allegations of a substantial nature, as distinct from baseless or trivial, and there is reasonable cause to believe the complaint is well founded, public employee privacy must give way to the public's right to know" even if no misconduct was found to have occurred. Under this standard, which governs over the narrower standard in 67.24(c)(7), the Department was not, on the facts presented to the Task Force, justified in withholding records regarding the investigation of the complaint into Mr. Storrs' conduct.

Relatedly, unless a specific employee had a good faith basis to fear retaliation or was a whistle-blower (neither of which applied to the case at hand) the names of the employees interviewed during the investigation could not be withheld under 67.24(c) and should be released.

6. The Order of Determination was issued on May 5, 2009 and the agency was required to release the withheld documents within 5 days.
7. On May 12, 2009 the status of DPW's compliance with the Order of Determination was heard before the Compliance & Amendments Committee of the SOTF. Mr. Frank Lee appeared on behalf of DPW and informed the Committee that the documents had not been released. The Committee informed Mr. Lee of the legal basis for the Order of Determination, including the fact that the Department applied the wrong legal standards for release of draft documents as well as when records regarding complaints on public employees' conduct should be released. Mr. Lee indicated that he would need to check with his supervisor and the City Attorney before he could commit to releasing the withheld records but that he would do so.
8. Because DPW had not complied with the Order of Determination, the Compliance & Amendments Committee voted to refer the matter back to the Full Task Force for a finding of willful failure to comply and potential referral to the Ethics Commission for enforcement. The Committee advised Mr. Lee that if DPW complied with the Order of Determination and released the records, then the suggested referral to the Ethics Commission would be moot.

9. The referral from the Compliance & Amendments Committee was heard at the Task Force's regular meeting on Tuesday, May 26, 2009. DPW was represented by Mr. Lee. Mr. Lee testified that he had not spoken with the City Attorney's office and that DPW had not and did not plan to release the withheld documents. As such, on a motion, the Task Force voted that the Department of Public Works be referred to the Ethics Commission pursuant to sections 67.30(c) and 67.34 for official misconduct based on willful failure to comply with the Sunshine Ordinance and the Order of Determination issued on May 5, 2009.

The Task Force found that the Department of Public Works, through its representative Frank Lee, violated Section 67.30 (c) of the Sunshine Ordinance for failure to turn over public records and Section 67.34 for willful failure to comply with the Order of Determination issued by the Task Force. Under the Sunshine Ordinance those acts shall be deemed official misconduct.

This request and referral is made under section 67.30 (c) whereby the Task Force shall make referrals to a municipal office with enforcement power under the Sunshine Ordinance or under the California Public Records Act and the Brown Act whenever it concludes that any person has violated any provisions of this Ordinance or the Acts and section 67.34 whereby complaints involving willful failure to comply with the Sunshine Ordinance shall be referred to and handled by the Ethics Commission

Attached to this letter is the May 5, 2009, Task Force Order of Determination, all documents regarding this complaint that have been submitted to the Sunshine Ordinance Task Force, the final and draft minutes from the Task Force meetings of April 28, 2009, and May 26, 2009, and the final meeting minutes from the Compliance and Amendments Committee meeting of May 12, 2008. If you need any further information, including audio recordings of any of the meetings referenced above, please feel free to contact me, or the Task Force Administrator at (415) 554-7724.



Kristin Murphy Chu, Chair
Sunshine Ordinance Task Force

cc: David Larkin, complainant
Frank Lee, respondent
Ernie Llorente, Deputy City Attorney