

**SUNSHINE ORDINANCE  
TASK FORCE**



**City Hall  
1 Dr. Carlton B. Goodlett Place, Room 244  
San Francisco 94102-4689  
Tel. No. (415) 554-7724  
Fax No. 415) 554-7854  
TDD/TTY No. (415) 554-5227**

February 15, 2010

Office of the District Attorney  
Hall of Justice  
850 Bryant Street, Room 325  
San Francisco, CA 94103

**Referral of Sunshine Ordinance Complaint #09039, Rita O’Flynn v. Mayor’s Office of Housing**

This is a referral from the September 22, 2009, Order of Determination from the Sunshine Ordinance Task Force against the Mayor’s Office of Housing, (MOH) through its representatives Douglas Shoemaker and Oliver Hack, for failure to comply with the Order of Determination and failure to appear at Task Force hearings. The referral is made pursuant to Sunshine Ordinance sections 67.30(c) and 67.34.

**Background**

Complainant Rita O’Flynn has been communicating with and submitting record requests to the MOH regarding, among other issues, a federal HUD Lead Abatement Grant for lead abatement at a property owned by Ms. O’Flynn and administered by MOH. In March 2008, Ms. O’Flynn requested the opportunity to review the entire HUD Lead Abatement files with respect to her property at the MOH. After she reviewed the files, she requested that they be copied in their entirety. Upon receiving the copies, she realized that the provided records did not include emails regarding 1672/1674 Great Highway that she had reviewed in person, including an email from a tenant at Ms. O’Flynn’s property to the MOH. Ms. O’Flynn then submitted a specific request for all email records regarding the lead abatement grant and her property, and she was told that the email records had been deleted since MOH keeps electronic records for only two years. Ms. O’Flynn also alleged that on September 11, 2009, MOH produced a February 2007 email between two employees of the MOH (Michael Palmer and Myrna Melgar-Iton) regarding 1672/1674 Great Highway that Ms. O’Flynn claimed was not produced in response to her original request, and should have been produced from Ms. Melgar-Iton’s emails at MOH had those emails not been deleted. Mr. Hack of the MOH indicated that the Palmer/Melgar-Iton email was found as a result of a subsequent search of Mr. Palmer’s email and he produced it because he wasn’t sure if Ms. O’Flynn had already received it.

## **Task Force Hearing**

On September 22, 2009, Ms. O'Flynn and Mr. Hack appeared before the Task Force again. Ms. O'Flynn's amended submission to the Task Force included specific allegations identifying emails that were responsive to her request and should have been produced originally, but were not, including the email between Ms. Melgar-Iton and Ms. O'Flynn's tenant and the email between Mr. Palmer and Ms. Melgar-Iton about Ms. O'Flynn's property. Mr. Hack of the MOH did not respond or address Ms. O'Flynn's specific evidence, but reasserted that the MOH had produced all responsive emails from Ms. Melgar-Iton and other members of the MOH staff and that any deleted emails were properly deleted after two years in accordance with the MOH records retention schedule. Mr. Hack also noted that he produced the February 2007 email between Ms. Melgar-Iton and Mr. Palmer from Mr. Palmer's email as a result from a subsequent search for responsive emails regarding her property.

The Task Force was troubled by the MOH's failure to respond to Ms. O'Flynn's evidence and explain why certain emails were not produced from a search of Ms. Melgar-Iton's email. Moreover, the Task Force found that emails regarding the lead abatement work and terms of that grant should have been retained, under the Mayor's Office's own records retention policy, for a minimum of five years.

## **Order of Determination**

The Task Force found that the MOH violated Sunshine Ordinance Section 67.21 for failure to produce requested records and Section 67.29-7(a) for failure to maintain records as required by the Administrative Code and MOH's retention policy. The MOH was directed to ask the Department of Technology to restore Ms. Melgar-Iton's emails that fall within the time frames Ms. O'Flynn requested during her original request. The order was limited to Ms. Melgar-Iton's emails, as the evidence provided indicated that Ms. Melgar-Iton's emails were not produced and subsequently deleted (as opposed to other members of the MOH as to whom no showing had been made that emails have been improperly deleted). The cost to restore and review Ms. Melgar-Iton's records for responsive emails was to be borne by the MOH. The agency was told to appear before the Compliance and Amendments Committee on October 13, 2009, to discuss compliance.

## **Hearings at the Compliance and Amendments Committee**

At the October 13, 2009 Compliance and Amendments meeting, Mr. Shoemaker of the MOH said the office believes it has supplied all the emails in their possession but following the issuance of the Order of Determination the office was going to replicate all the emails within the time period the O'Flynn's have requested on a rolling basis. He also said his office would work with the Department of Technology to get a snapshot of Ms.

Melgar-Iton's email inbox during the time frame covered by the request and to search for emails that deal with the subject matter as requested by the O'Flynn's.

The matter was continued to November 10, 2009, meeting to which the MOH did not attend. Correspondence from the MOH to Ms. O'Flynn was provided, explaining that Ms. Melgar-Iton's email was searched using specified terms and responsive emails were turned over to Ms. O'Flynn. Ms. O'Flynn argued that only a handful of emails had been produced and none at all from 2005, during the time that the lead abatement work was being done, leading her to question the thoroughness of the search.

Members of the Committee were disappointed and stressed the need for the department to be present because the Committee had questions, including when Ms. Melgar-Iton's emails had been restored and for what time frames. Members expressed concerns that while the MOH may well be in compliance with the Order of Determination, the Committee could not decide that without answers to some basic questions from the MOH. Members also noted that the Committee could find MOH in willful violation for failure to comply and attend the hearings, but to do so would not be to Ms. O'Flynn's advantage. Therefore, the matter was again continued to the December 8, 2009, meeting in order to get additional information from the MOH, and a letter seeking that additional information was sent by the Chair to the MOH.

At the December 8, 2009, meeting, again, the MOH was not represented at the hearing and no correspondence had been sent to the Task Force from the MOH explaining whether the MOH was in compliance with the Order of Determination.. Members then voted to forward to matter to the Task Force for a finding of willful violation under Sections 67.21(e), 67.30 and 67.34 for willful failure to comply with the Order of Determination and repeated failure to send a representative to the hearings.

### **Task Force Referral**

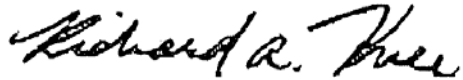
At the Task Force's January 5, 2010, meeting, and again in the absence of a MOH representative, members voted to refer the matter to the District Attorney and the Ethics Commission for investigation and enforcement based on a finding of willful violation under Sections 67.21(e), 67.30 and 67.34 for willful failure to comply with the Order of Determination and repeated failure to send a representative to the hearings.

### **Supporting Materials**

The enclosed CD contains material in reference to this referral including (1) the September 22, 2009, Task Force Order of Determination, (2) documents regarding this complaint that have been submitted to the Sunshine Ordinance Task Force, (3) the clarification letter to MOH, (4) the minutes from the Task Force meetings on August, 25, 2009, September 22, 2009, January 5, 2010, meetings and the minutes from the Compliance and Amendments Committee meetings on October 13, 2009, November 10, 2009, and December 8, 2009.

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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.

A handwritten signature in black ink that reads "Richard A. Knee". The signature is written in a cursive style with a large initial 'R'.

Richard Knee, Chair  
Sunshine Ordinance Task Force

cc: Rita O'Flynn, complainant  
Dough Shoemaker, respondent  
Oliver Hack, respondent  
Jerry Threet, Deputy City Attorney