

**SUNSHINE ORDINANCE  
TASK FORCE**



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**ORDER OF DETERMINATION**

February 25, 2010

**DATE THE DECISION ISSUED**

January 26, 2010

*BRED STARR v. CITY ATTORNEY'S OFFICE (09075)*

**FACTS OF THE CASE**

Complainant, Bred Starr, alleges that her Sunshine request for documents from the City Attorney's Office (CAO) and the Municipal Transportation Authority (MTA) related to Mary Ellen O'Brien from the Department of Parking and Traffic and Geraldine Rosen Parks in August 2009 was ignored. She also alleges that her telephone and in-person requests were acknowledged and then ignored, and was advised there would not be full disclosure.

**COMPLAINT FILED**

On October 16, 2009, Bred Starr filed a Sunshine Ordinance Complaint against the CAO and the MTA for unspecified violations of the Sunshine Ordinance.

**HEARING ON THE COMPLAINT**

On January 26, 2010, Complainant Bred Starr presented her claim before the Task Force. Virginia Dario Elizondo of the City Attorney's Office presented the Respondent's defense.

Ms. Starr told the Task Force that she had asked for documents regarding the investigation of Mary Ellen O'Brien of the Department of Parking and Traffic in 2004. The investigation, she said, was done on behalf of the City and not on behalf of the taxpayers and that made access to documents difficult. She wanted to know why Ms. O'Brien is still a City employee and what was said during the investigation. She said she received only four pages about the case from the CAO whereas a news article in the San Francisco *Chronicle* referred to a 16-page investigative memo about the matter.

Ms. Elizondo said the Sunshine request was for an internal investigative memo drafted by the CAO for its client, the MTA, which apparently had been leaked to the press. She stated further that the memo was confidential under state law because it was protected by both the attorney work product doctrine and the attorney-client privilege. In addition, two disciplinary letters sent to the subject of the investigation which were responsive to the request were

### ORDER OF DETERMINATION

provided to the complainant by the CAO, she said. Just because a document or portions of it are leaked to the press does not make it a public document, she added, as the confidentiality may be waived only by a City official with authority to make such a waiver.

Ms. Elizondo further noted that, in the absence of evidence that an authorized public official waived the privileges, the CAO still had an ethical and legal duty to maintain the privilege under state law. Therefore, the CAO could not release the documents. Ms. Elizondo further noted that the Sunshine Ordinance contains specific exemptions to disclosure for documents covered under these two privileges.

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Task Force noted that there is no case law exactly on point on this issue – whether or not records regarding an investigation into employee misconduct conducted by a city attorney are totally protected from release by the attorney-client privilege and/or work product doctrine. The Task Force did note that under existing California law, records of investigations into alleged employee misconduct must be released unless the allegations of misconduct are not substantial in nature. *See, .e.g., Bakersfield City School Dist. v. Superior Court* (2004) 118 Cal.App.4th 1041.

The Task Force also noted that where an investigation is primarily factual, the attorney-client privilege may not apply to records of the investigation, at least the portions of the records discussing the facts of the investigation. Finally, while the City in this case did release the two disciplinary letters that were issued to the employee in question, it may not always be the case that disciplinary letters are produced at the conclusion of an investigation into employee misconduct. Indeed, in cases where the City Attorney conducts the factual investigation into employee misconduct and no discipline is imposed, the only record of the investigation may well be the investigatory memorandum. In that scenario, under the City Attorney's position, *no* records regarding the alleged employee misconduct would be produced and the public would be left in the dark about serious, if unsustainable, allegations of public employee misconduct.

Based on the testimony and evidence presented the Task Force finds that the factual background in the investigatory memorandum is critical for the public to see and understand, especially now that the investigation is complete, but that justifiable redactions may be made if any particular allegations were found to be insubstantial.

### DECISION AND ORDER OF DETERMINATION

The Task Force finds that the agency violated Section(s) 67.21 and 67.24 for failure to produce responsive documents, specifically the 16-page memorandum regarding the employee's misconduct. The Respondent shall release the records requested within five business days of the issuance of this Order of Determination and appear before the Compliance and Amendments Committee on March 9, 2010.

**ORDER OF DETERMINATION**

The motion was adopted by the Sunshine Ordinance Task Force on January 26, 2010, by the following vote: ( Craven-Green / Washburn)

Ayes: Manneh, Washburn, Johnson, Goldman, Williams, Cauthen, Craven-Green

The Task Force also found the agency in violation of Sec(s) 67.21 ( b ) for untimely response and 67.25 for failure to provide documents in a timely fashion ( Cauthen / Williams )

Ayes: Cauthen, Manneh, Washburn, Johnson, Goldman, Williams

Noes: Craven-Green



Richard A. Knee, Chair  
Sunshine Ordinance Task Force

c: Jerry Threet, Deputy City Attorney  
Bred Starr, complaint  
Virginia Dario Elizondo, respondent