

**SUNSHINE ORDINANCE  
TASK FORCE**



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**ORDER OF DETERMINATION**

January 29, 2009

**DATE THE DECISION ISSUED**

January 5, 2009

*MELVYN BANKS v. DEPARTMENT OF PUBLIC HEALTH (09077)*

**FACTS OF THE CASE**

Complainant Raymond Banks said the Department of Public Health (DPH) has failed to provide notice of, and an opportunity for members of the public to provide comments at, meetings of the DPH Privacy Board (Privacy Board). Mr. Banks also said that DPH failed to respond to an Immediate Disclosure Request (IDR) for a copy of the San Francisco Share Mandate Policy and for notes taken by DPH employees during a meeting on September 22, 2009, between DPH and AIDS service providers regarding a transition from Reggie to ARIES reporting systems, which Mr. Banks made on November 19, 2009. On November 3, 2009, DPH responded by email to Mr. Banks' request to attend DPH Privacy Board meetings by stating that the body was not a legislative body under the Brown Act, and thus was not required to allow public attendance at its meetings.

**COMPLAINT FILED**

On November 6, 2009, Mr. Banks filed a complaint against DPH. On November 24, 2009, Mr. Banks amended his complaint to provide more supporting material and to add the allegations regarding his November 19, 2009, IDR. At the hearing on jurisdiction on his complaint, Mr. Banks agreed to withdraw the additional allegations regarding his November 19, 2009, IDR and file those as a separate complaint.

**HEARING ON THE COMPLAINT**

On January 5, 2010, Melvyn Banks presented his claim. The respondent was not represented. There was also no one in the audience who spoke or presented facts or evidence on behalf of the respondent.

Mr. Banks said the Public Health Privacy Board meetings were closed to the public and he would like to know what goes on behind closed doors because in some cases it could be infringing on constitutional privacy rights. He also said two employees from the same department are contradicting themselves on the existence of the local Share Mandate Policy, a document he requested and has not received.

**ORDER OF DETERMINATION****FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The Task Force found, based on the written response of DPH, the testimony of complainant and the advice of the Deputy City Attorney, that the Privacy Board consists solely of employees of DPH that review and develop policies related to an issue of public health, namely client and patient confidentiality, and that it therefore constitutes a "passive meeting body" under Administrative Code § 67.3(c)(5).

DPH argued in its written response that it cannot allow attendance at the meetings of the Privacy Board by members of the public because the meetings routinely involve discussion of details of confidential client health information that is protected from disclosure by federal law. Although DPH did not identify the federal law involved, the assumption was made that the law in question is the Privacy Rule of the Health Insurance Portability and Accountability Act (HIPAA), 45 CFR §§ 164.500, et seq. The Task Force found that, even assuming that HIPAA would prevent disclosure of the information referred to by DPH at meetings of the Privacy Board, such disclosures could take place during closed sessions, if necessary, and still preserve the ability of the Privacy Board to allow attendance by members of the public. Further, the failure of DPH to send a representative to the complaint hearing prevented the Task Force from being able to determine whether the allegedly confidential client information referred to by DPH was the type of information protected by HIPAA or whether disclosure of such information was necessary to the conduct of Privacy Board meetings.

Given the availability of closed sessions to address any necessary discussion of confidential client information protected by HIPAA, the Task Force found that there was no conflict between the requirements of HIPAA and those of the Sunshine Ordinance. It therefore found DPH to be in violation of the requirements of the Ordinance.

**DECISION AND ORDER OF DETERMINATION**

The Task Force found that the agency violated Section 67.4, which covers passive meetings. The matter was referred to the Feb. 11, 2010, Education, Outreach and Training Committee meeting.

This Order of Determination was adopted by the Sunshine Ordinance Task Force on Jan. 5, 2010, by the following vote: ( Washburn / Goldman )

Ayes: Manneh, Washburn, Knoebber, Chu, Chan, Goldman, Williams, Knee.



Richard A. Knee  
Chair, Sunshine Ordinance Task Force

c: Jerry Threet, Deputy City Attorney  
Melvyn Banks, Complainant  
Eileen Shields, Respondent