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## Via Electronic Mail

August 9, 2011

Hope Johnson, Chair  
Sunshine Ordinance Task Force  
1 Dr. Carlton B. Goodlett Place, Room 244  
San Francisco, CA 94102-4689

### **RE: Ethics Complaint No. 05-110607**

Dear Ms. Johnson:

On May 16, 2011, the Sunshine Ordinance Task Force ("Task Force") referred Complaint No. 10063 (Ethics Complaint No. 05-110607). The Task force referred the matter for "failure to comply with the Order of Determination stemming from a complaint filed by Debra Benedict," and named Martha Cohen and Myisha Hervey, employees of the Mayor's Office of Economic & Workforce Development ("OEWD"), as the respondents. The referral was made under section 67.30(c) of the Sunshine Ordinance. No other code section was included in the referral.

Pursuant to section VI.D of the San Francisco Ethics Commission's Regulations for Investigations and Enforcement Proceedings, staff's recommendation was submitted to the Ethics Commission for consideration to be calendared at the Regular Meeting of the San Francisco Ethics Commission on August 8, 2011. The matter was not calendared and staff's recommendation is thus accepted.

This matter originated from a complaint filed by Debra Benedict with the Task Force on November 16, 2010. Ms. Benedict alleged that she was denied access to a public document. Ms. Benedict made two written public records requests. The first request was on November 5, 2010, in which she asked for the "contract documents pertaining to the employment of the production company that managed the Giants celebration on Nov. 3, 2010 at City Hall." The second request was on November 30, 2010, in which she asked: "this is a request for access to examine the contract between your offices and the SFGiants for Nov. 3, 2010, the date that they had the parade and event on the steps of city hall." The OEWD responded to Ms. Benedict both times stating that no such contract existed. The OEWD did not respond to the first request until November 23, 2010.

On January 25, 2011, the Task Force held a hearing on the matter. The OEWD was represented by Myisha Hervey, who stated that there were no records responsive to the request. The Task Force determined that the OEWD violated Sunshine Ordinance section 67.21(b) for failing to respond timely, section 67.21(c) for failing to assist the requestor, and section 67.25(a) for failing to respond in the time frame for an immediate disclosure request. No individual was named in the motion. On February 22, 2011, the full Task Force met and voted to refer the matter to the Ethics Commission. The Task Force decided to add Ms. Hervey as a respondent at this meeting, and the motion and vote was to “refer this matter” to the Ethics Commission.

Because the referral did not identify which violations were being referred, the Ethics Commission addressed the findings in the original Order.

*a. The OEWD did not respond within the 10-day period and violated section 67.21(b).*

Section 67.21(b) provides that compliance with a document request must occur within ten days of the date of the request. The word “day” is not defined in the Ordinance; however, there are several other distinct references to “business day.” The City Attorney advises that the response should be within 10 calendar days, but may take up to 14 days in “unusual circumstances.” (*See* S.F. Good Govt. Guide, Part 3, § II(F)(3)(a).) The Task Force made its determination based on the original request of November 5, 2010, which was not responded to until November 23, 2010.

Regardless of whether or not the 10 or 14 day response time applied, the OEWD response was not timely. However, the Ethics Commission concurred with the Task Force and did not find that the delay in response time was willful.

*b. The request made to the OEWD was specific and did not implicate the requirements under section 67.21(c).*

The Task Force made the determination that the OEWD violated section 67.21(c) based on testimony provided by both the respondent and complainant at the Task Force hearing held on January 25, 2011, at which Ms. Benedict revealed she sought ADA compliance information regarding the November 3 event. The Task Force based this violation on the finding that the OEWD had the duty to affirmatively determine what information Ms. Benedict sought when she made the request and aid her in uncovering that information.

Section 67.21(c) requires that a custodian of records do two things to aid a requestor: 1) the custodian must help a requestor identify information that will allow the request to be made with enough specificity so that the custodian can fulfill the document request, and 2) when a custodian is not in possession of the record requested, he or she must assist a requester in directing the request to the proper office or staff person.

Both of Ms. Benedict’s requests asked for a specific contract with no indication that she was seeking ADA compliance information. The Sunshine Ordinance actually prohibits a public official from asking a requestor why they are seeking documents. (*See* section 67.25(c) [person seeking the information need not state his or her reason for making the request or the use to

which the information will be put, and requesters shall not be routinely asked to make such a disclosure].)

Given the specificity of both document requests, the OEWD responded appropriately by stating that there were no responsive documents as there was no ambiguity as to what document the requestor sought. It was only during the hearing on the matter in which Ms. Benedict revealed that she sought information regarding ADA compliance. Further, the OEWD identified for Ms. Benedict that any such contract was between two private entities and provided her with those names. Thus, the Ethics Commission found that the OEWD satisfied the requirements under section 67.21(c) and dismissed this violation.

c. The request was not an "Immediate Disclosure Request."

Section 67.25(a) shortens the amount of time a custodian of records has to fulfill a document request from ten days to the close of business following the day of the request. The "deadline shall apply only if the words "Immediate Disclosure Request" are placed across the top of the request and on the envelope, subject line, or cover sheet in which the request is transmitted.) (See Section 67.25(a).) Neither request contained the required language, or any similar language, to invoke section 67.25(a). Thus, the Ethics Commission found that there was no violation of section 67.25(a).

d. The Task Force made no motion requiring the release of documents or attendance at the CAC meeting, and no responsive documents existed.

The written referral from the Task Force was for the "failure to comply" with the Order. The Order found three violations of the Sunshine Ordinance. Although not voted on at the hearing, the written Order also ordered the release of the requested records within 5 days and attendance at the CAC. As the OEWD was represented at the CAC, the referral could only be based on the failure to release the requested records.

During the hearing the Task Force determined that other documents likely existed that contained the ADA compliance information Ms. Benedict sought, and those documents should be released. However, as addressed above, there were no responsive documents. Moreover, the Task Force made no formal motion during the hearing to order the release of any record. Thus, the Ethics Commission found no violation for failing to comply with the Order.

e. The Order cannot be enforced against Ms. Cohen or Ms. Hervey.

The original complaint was against Ms. Cohen. The Task Force's Order was directed only to the "agency." Ms. Hervey was not the named respondent and attended the proceedings unaware that she would be named a respondent at some point. It was only at the last meeting regarding this matter on February 22, 2010, that the Task Force decided to amend the referral to include the original complainant and Ms. Hervey.

This referral was made under section 67.30(c) which provides that the Task Force may make referrals to a "municipal office with enforcement power." Section 67.35 outlines the

enforcement provisions under the Sunshine Ordinance. Subsection (d) is the only part of section 67.35 pertinent to the Ethics Commission, which states: “[a]ny person may institute proceedings for enforcement and penalties under this act in any court of competent jurisdiction or before the Ethics Commission if enforcement action is not taken by a city or state official 40 days after a complaint is filed.”

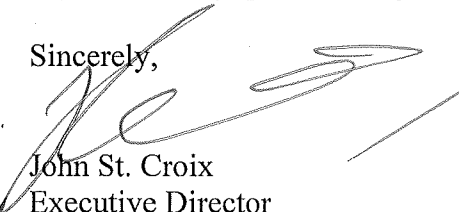
However, the only power granted to the Ethics Commission by the Sunshine Ordinance is to “handle” allegations of willful violations of the Ordinance under section 67.34. Section 67.34 states that the willful failure to discharge the duties of the Ordinance is deemed official misconduct; and it only allows the Ethics Commission to “handle” complaints involving allegations of willful violations by an elected official or a department head.

Sunshine Task Force referrals of a willful violation by an elected official or department head are subject to the Enforcement Regulations that currently govern all Ethics Commission complaints. If after conducting an investigation, probable cause hearing, and hearing on the merits, the Ethics Commission determines that a willful violation of the Ordinance occurred, the only recourse allowed by the Sunshine Ordinance is to invoke the provisions for suspension and removal contained in Charter section 15.105.<sup>1</sup> Under that provision, the Ethics Commission cannot initiate the suspension or removal proceeding; it can only be initiated by the official’s appointing authority and the Ethics Commission then follows the hearing procedures mandated by that provision. The Sunshine Ordinance does not provide any monetary or other administrative penalty.

As this complaint was not referred as a “willful” violation under section 67.34, it cannot be enforced against the respondents. Even if the matter had been referred as a willful violation, neither Ms. Cohen nor Ms. Hervey are elected officials or department heads. However, as the Ethics Commission concurs that a violation of section 67.21(b) occurred, staff has been instructed to send a letter to Ms. Cohen advising her of the required time to reply to a public records request.

If you have any questions regarding this matter, please call enforcement staff at (415) 252-3100.

Sincerely,



John St. Croix  
Executive Director

Enclosures

Cc: Debra Benedict, Complainant  
Martha Cohen, Respondent  
Myisha Hervey, Respondent

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<sup>1</sup> Subsections (a) and (b) enumerate which officers are subject to suspension and removal by the Mayor. The Ethics Commission can only hold a hearing after the Mayor presents written charges to the Ethics Commission. Subsection (c) provides for the removal of officials not enumerated in subsection (a) and (b), but they can only be removed for the conviction of a felony crime involving moral turpitude.

Bruce Wolfe, Vice Chair SOTF  
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