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Via U.S. Mail

December 15, 2010

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

RE: Ethics Complaint No. 07-090702

Dear Mr. Knee:

The Sunshine Ordinance Task Force ("Task Force") referred Complaint No. 07-090702, alleging that the Department of Public Works ("DPW") violated sections 67.21, 67.24(a)(1), 67.24(c)(7), 67.30(c) and 67.34 of the Sunshine Ordinance. The Task Force alleged that DPW violated the Sunshine Ordinance by failing to produce all requested records and failing to comply with the Task Force's May 5, 2009 Order of Determination. The Task Force made this referral under sections 67.30(c) and 67.34 on June 2, 2009.

Pursuant to section IV.B. of the San Francisco Ethics Commission's Regulations for Investigations and Enforcement Proceedings ("the Regulations"), which were effective November 10, 2006 through January 8, 2010, the Ethics Commission conducted an investigation into the above-referenced complaint. *Please note that this case, as required by law, was considered under old regulations that have since been altered.*

The Ethics Commission has determined that the facts in this matter do not provide probable cause to believe that a violation of law has occurred. For this reason, and pursuant to section V.A.3 of the Regulations, the Ethics Commission has dismissed this matter.

This matter originated from a complaint filed against a DPW employee after an incident that occurred on November 14, 2008. The complainant sought records which DPW withheld under California Public Records Act ("PRA") sections 6254(c) and (k), because disclosing them would constitute an unwarranted invasion of personal privacy. The complainant filed a complaint with the Task Force regarding DPW's withholding of those documents.

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The Task Force held three hearings regarding this matter: an April 28, 2009 meeting of the full Task Force, a May 12, 2009 Compliance and Amendments Committee (“CAC”) meeting, and a May 26, 2009 meeting of the full Task Force. At the April 28, 2009 meeting, the Task Force heard this matter in approximately fifteen minutes and made its findings. The complainant did not provide any details regarding the underlying November 14, 2008 incident or the complaint filed against the DPW employee at any of the Task Force meetings.

The Task Force relied its decision to compel production of the documents mainly on *Bakersfield City School District v. Superior Court*, 118 Cal. App. 4th 1041 (2004).

The complaints against the public employee in *Bakersfield* were described as “[s]exual type conduct, threats of violence and violence” and therefore substantial in nature. *Id.* at 1043-1044. The court in *Bakersfield* provided that “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.” *Id.* at 1046. The *Bakersfield* court also decided that, “[i]n evaluating whether a complaint...is well-founded..., the courts...are required to examine the documents presented to determine whether they reveal sufficient indicia of reliability to support a reasonable conclusion that the complaint was well founded.” *Id.* at 1047.

According to the records, the Task Force did not hear any testimony at any of the meetings held regarding whether the complaints of the DPW employee’s wrongdoing revealed allegations of a substantial nature. The complainant provided no details of the November 14, 2008 incident. There was nothing in the Task Force record, in the documents that staff reviewed, or in interviews staff conducted to indicate that the allegations were of a substantial nature. The complainant never stated that any sexual type conduct, threats of violence, or violence occurred during the November 14, 2008 incident. Therefore, the Task Force did not show any basis for making and did not make a determination that the allegations presented were of a substantial nature.

The Task Force interpreted the *Bakersfield* court’s findings as the following: “unless the complaint against the public employee was groundless..., then all subsequent documents regarding the investigation and final report should be released and are...public records.” The Task Force concluded that the underlying complaint was well-founded and the documents should be disclosed.

While *Bakersfield* may be the appropriate standard in this case, staff found that the Task Force incorrectly applied it. No members of the Task Force asked any questions or made any comments regarding the events surrounding the November 14, 2008 incident or subsequent investigation. The Task Force provided no basis to find that the complaint against the DPW employee was well-founded or that the allegations were of a substantial nature.

Because DPW properly withheld the documents under PRA section 6254(c), staff has not found violations of sections 67.21 or 67.24 of the Sunshine Ordinance.

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Therefore, pursuant to section V.A.3 of the Regulations and the above reasons, the Ethics Commission has dismissed this matter. No further action will be taken at this time.

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

Sincerely,

A handwritten signature in black ink, appearing to read 'John St. Croix', with a long, sweeping horizontal stroke extending to the right.

John St. Croix
Executive Director

cc: Mr. David Larkin