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Via Electronic Mail

September 13, 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. 29-101222

Dear Chair Johnson:

On December 21, 2010, the Sunshine Ordinance Task Force ("Task Force") referred Complaint No. 10047 (Ethics Complaint No. 29-101222). The written referral stated that the District Attorney's Office, through the Chief of Administration, Paul Henderson, violated section 67.21(e) for not sending a "knowledgeable" representative to a Task Force hearing, section 67.25(d) for failing to provide documents within the statutorily mandated time period, section 65.26 for not keeping withholding to a minimum, and section 67.29-5 for failing to provide public calendars within three business days subsequent to a calendar entry date. The referral was made under sections 67.30(c) and 67.34 of the Sunshine Ordinance.

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 September 12, 2011. The matter was not calendared and staff's recommendation is thus accepted.

This matter originated from a complaint filed by Kellee Lanza with the Task Force on September 3, 2010, naming Paul Henderson, Chief of Administration, as the respondent, alleging the District Attorney's Office had not complied with a public records request.

On June 29, 2010, Kellee Lanza made a public records request to the District Attorney's Office, seeking the following:

1. District Attorney Harris's titles held, units assigned and salary and per diem payments from 1998 to present,

2. District Attorney Harris's travel and reimbursement expenses from 1998 to present,
3. District Attorney Harris's official calendar from 2004 to present,
4. The names and titles of any public employees traveling with Harris on any out of state trips,
5. Vehicle allowance and any city or county owned vehicle assigned to Harris from 1998 to present,
6. The number and members of Harris's security detail, including their salaries,
7. All official email to and from Harris from 1998 to present (in electronic format),
8. Phone and cell phone records from 1998 to present,
9. District Attorney Office budgets from 2003 to present,
10. A list of all office employees and their titles in the last two years,
11. Any and all work-place related complaints filed against Harris or the office by employees from 2004 to present.

On July 12, 2010, the District Attorney's Office responded invoking a 14-day extension citing that the request for records was voluminous. The District Attorney's Office also cited the "rule of reason" stating that it "must limit the time we spend responding to your public record requests as necessary to allow [the office] to perform [its] core functions."

On October 26, 2010, the Task Force held a hearing on the matter. The Task Force determined that the District Attorney's Office violated Sunshine Ordinance section 67.21(b) for failure to justify withholding of documents, section 67.21(e) for not sending a "knowledgeable" representative to the hearing, section 67.25(d) for failing to provide documents within the statutorily mandated time period, section 65.26 for not keeping withholding to a minimum, and section 67.29-5 for failing to provide public calendars within three business days subsequent to a calendar entry date. The written Order of Determination issued on November 1, 2010, reflected the motion and, in addition, ordered the release of the documents within five days and attendance at the Compliance and Amendments Committee ("CAC") meeting on November 9, 2010.

At the November 9, 2010, CAC meeting, Mr. Henderson attended and stated that his office provided Ms. Lanza with all responsive documents just prior to the CAC meeting. Ms. Lanza stated that she could not verify that the documents were responsive, but had received records from the District Attorney's Office. The CAC decided to calendar the matter to be heard at the November 30, 2010, full Task Force meeting.

On November 30, 2010, Ms. Lanza stated that the District Attorney's Office did provide the documents she requested and satisfied her public records request as of November 9, 2010. The Task Force voted to refer a willful violation against Mr. Henderson under section 67.34 for all violations stated in the written Order except for section 67.21(b). The referral letter to the Ethics Commission reflects the motion taken at that meeting.

The Ethics Commission has dismissed this matter for the reasons stated below.

a. There is no violation of section 67.21(e) because the named respondent attended the Task Force hearing.

The Task Force expressed that the section 67.21(e) violation was because Mr. Henderson did not have some of the relevant information regarding the delay in response.¹ The Task Force stated on the record that it was referring a willful violation of section 67.21(e) because the District Attorney's Office failed to send a "knowledgeable" representative to the Task Force hearing held on October 26, 2010. Section 67.21(e) provides the mechanism for a requestor of records to petition the Task Force for a determination on whether a record is public, and also provides that the Task Force may hold a hearing regarding that determination when requested by the petition. Section 67.21(e) further provides that "[a]n *authorized* representative of the custodian of the public records requested shall attend any hearing and explain the basis for its decision to withhold the records requested [emphasis added]." The word "knowledgeable" does not appear anywhere in section 67.21(e).

Section 67.21(e) requires that an "authorized" representative of the custodian of records attend the hearing. Here, the actual custodian and named respondent attended both the hearing on the matter and the CAC meeting on November 9, 2010.

b. The delay in response was subject to the "rule of reason."

Section 67.25(d) ensures that responsive public records are released as soon as reasonably possible on a "rolling" basis in order to prohibit withholding any responsive record until all responsive records become available. The District Attorney's Office responded stating that given the voluminous nature of the request, it was applying the "rule of reason" as allowed by *Bruce v. Gregory* (1967) 65 Cal.2d 666, and *Rosenthal v. Hansen* (1973) 34 Cal.App.3d 754. Under the "rule of reason" doctrine a city department may limit the time spent responding to public records requests when a requestor has made a voluminous request that takes significant time to respond to, and when it would otherwise interfere with the ability of the department's staff to perform their other duties, or respond to other records requests made by other individuals. (See *Bruce v. Gregory*, *supra*, 65 Cal.2d at p. 676.) Neither *Bruce* nor *Rosenthal* address what time frame would be considered "reasonable" regarding the length of time required to respond to a voluminous request.

The Task Force determined that a four-month period of time was too long even under the "rule of reason" doctrine in finding this violation. The Ethics Commission agrees with the Task Force; however, given the lack of guiding case law, and that Ms. Lanza was provided with the responsive documents, the Ethics Commission determined that that any delay in releasing the requested documents was not done willfully.

¹ Mr. Henderson stated at the hearing that the staff member responsible for the records request was not able to attend the hearing, and that the DA's Office had asked for a continuance two weeks prior to the hearing so that the appropriate person could have attended with him. The continuance request was denied by the Task Force.

c. No documents were withheld where some information of a record was exempt.

Section 67.26 prohibits the withholding of an entire document where some information is public and some is exempt. In such a case, this section requires that the exempt information be redacted so the record may be released. It further states that this work shall be considered part of the regular work duties of city employees.

When the Task Force found this violation, no assertion had been made that the District Attorney's Office was withholding any information. Mr. Henderson stated that part of the delay in response was due to the redaction process so that records that contained social security numbers or credit card numbers could be redacted from documents that should be otherwise released. Thus, there was no basis for finding this violation.

d. The District Attorney's Office should have released the calendars within three business days.

Section 67.29-5 provides that all department heads must keep a public calendar and that it will be made available three business days after the calendar entry date. Mr. Henderson explained that the request asked for calendars as far back as 2004 and that there was no one method to maintain the District Attorney's calendar, thus his staff needed to redact any purely personal information from the calendars. The Task Force found that regardless of how long the request was for, public calendars are to be maintained and available within three days. The Ethics Commission concurs with the Task Force that public calendars should be maintained to be available with the required three days from the entry date. However, the Ethics Commission did not determine that the delay in the release of the calendars occurred willfully.

e. The District Attorney's Office complied with the Order.

The written order from the Task Force mandated the release of the requested documents and that the District Attorney's Office attend the CAC meeting on November 9, 2010. The District Attorney's Office released all responsive documents by November 9, 2010, and Mr. Henderson attended the CAC meeting.

f. Mr. Henderson was not a public official or department head.

Section 67.30(c) 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." The enforcement power of the Ethics Commission provided for "under this act" is outlined in section 67.34.

Under the Sunshine Ordinance the Ethics Commission may "handle" allegations of willful violations of the Ordinance under section 67.34. It states that the willful failure to discharge the duties of the Ordinance is deemed official misconduct, and specifically provides that the Ethics

Commission can only handle complaints involving allegations of willful failure by elected officials or department heads.

Mr. Henderson was not an elected official or department head. Thus, the Ethics Commission cannot pursue any enforcement action against Mr. Henderson. However, the Ethics Commission directed staff to advise Mr. Henderson of the requirement to release public calendars on a timely basis pursuant to section 67.29-5.

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

Sincerely,



John St. Croix
Executive Director

Enclosures

Cc: Kellee Lanza, Complainant
Paul Henderson, Respondent
Bruce Wolfe, Vice Chair SOTF
David Snyder, Esq., Member SOTF
Richard Knee, Member SOTF
Sue Cauthen, Member SOTF
Suzanne Manneh, Member SOTF
Allyson Washburn, Member SOTF
James Knoebber, Member SOTF
Jay Costa, Member SOTF
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