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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. 06-110816

Dear Chair Johnson:

On August 15, 2011, the Sunshine Ordinance Task Force ("Task Force") referred Complaint No. 10054 (Ethics Complaint No. 06-110816). The written referral stated: "The [Task Force] hereby provides notification of willful failure and official misconduct findings against Jewelle Gomez of the Library Commission for failure to comply with the Order of Determination ("Order") issued on February 7, 2011 in Sunshine Complaint No. 10054, Ray Hartz v. Library Commission.)" The referral was made pursuant to Sunshine Ordinance section 67.34, and City Charter section 15.105(e). The referral also stated that the Task Force "further refers the Order for enforcement, and requests Ms. Gomez be required to include the written summary of 150 words or less submitted by complainant Ray Hartz in the body of the Library Commission minutes for September 16, 2010." The "enforcement" referral was made under section 67.30(c).

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 Ray Hartz with the Task Force on October 14, 2010, against Sue Blackman, the Library Commission Secretary, for violating section 67.16 of the Sunshine Ordinance, alleging that his comments were not included in the minutes. On October 20, 2010, Mr. Hartz filed an amendment to his complaint including an alleged violation of section 67.15(d). On October 29, 2010, he filed a second amendment to include a "parallel complaint of violating the Brown Act."

On September 16, 2010, Ray Hartz attended a Library Commission meeting. Mr. Hartz made an oral statement regarding "Agenda Item No. 5, Approval of the Minutes of August 19, 2010," and submitted a written statement of 147 words to be included in the minutes. The written minutes issued for the September 16, 2010, Library Commission meeting contained a summary of Mr. Hartz's comments under the agenda item, and included the written statement he submitted as an attachment at the end of the minutes.

On October 27, 2010, Sue Blackman submitted a written response to the Task Force after she was noticed of the hearing requesting that the matter be dismissed. Ms. Blackman contended that the Library Commission appropriately summarized Mr. Hartz's remarks for approval within the body of the minutes, and also appropriately included the submitted statement as an attachment to the minutes. Ms. Blackman included a copy of the September 16, 2010, Library Commission meeting minutes to support her assertion that no violation occurred.

On January 4, 2011, the matter was first scheduled to be heard, and Ms. Blackman attended that hearing. The Task Force continued the matter to January 25, 2011. Ms. Blackman requested a continuance in writing on January 20, 2010, because she could not attend on January 25. The Task Force did not grant her request and informed her that the "City Librarian Luis Herrera be prepared to send someone else who is knowledgeable on the issue."

Mary Hudson, a Senior Management Assistant for the Library Department, was sent as an authorized representative to the hearing. Ms. Hudson again asked for a continuance on behalf of Ms. Blackman, which the Task Force denied. The motion that the Task Force passed at the hearing was to find a violation of 67.15 and 67.16 against the Library Commission, and section 67.21(e) against Jewelle Gomez, the Library Commission President. On June 28, the Task Force voted to refer the matter to the Ethics Commission.

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

- a. *There is no violation of section 67.21(e) because an authorized representative attended the Task Force hearing and the hearing was regarding public meeting violations.*

The written Order issued by the Task Force on February 7, 2011, stated that the violation of section 67.21(e) was against Ms. Gomez for "not sending a person knowledgeable in this matter to the hearing." Section 67.21(e) provides that the Task Force may hold a hearing regarding *public records request denials*. Section 67.21(e) also 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).

Further, the matter here was regarding a public meeting violation, not a public records denial. The Sunshine Ordinance provides no mechanism to compel a public official to attend a hearing before the Task Force regarding public meeting violations. Nevertheless, Ms. Blackman attended the first meeting, which was continued, and she subsequently requested a continuance in writing until a date after January 25, 2011, because she could not attend on that date. The

Task Force denied the request. Mary Hudson was sent to attend the hearing as Ms. Blackman's authorized representative. Ms. Hudson stated to the Task Force that Ms. Blackman was responsible for the minutes and she again requested a continuance on behalf of Ms. Blackman, which the Task Force denied.

The Task Force ultimately determined at the hearing that the violation of section 67.21(e) should be against Ms. Gomez. The Task Force added Ms. Gomez at the hearing because she was the Library Commission President and the Task Force determined she should be responsible for sending someone "knowledgeable." Ms. Gomez was not the named respondent and she had no notice that she was expected to attend the hearing or send a "knowledgeable" person. The Task Force specifically advised the City Librarian to send a representative, which he did.

b. The Library Commission included Mr. Hartz's statement as required by the Sunshine Ordinance and as advised by the City Attorney.

Section 67.16 of the Sunshine Ordinance requires boards and commissions to record minutes for each regular and special meeting. It also states that "[a]ny person speaking during a public comment period may supply a brief written summary of their comments which shall, if no more than 150 words, be included in the minutes." The Office of the City Attorney has published an overview of the laws governing the conduct of public officials in its Good Government Guide. In this guide, the Office of the City Attorney has advised policy bodies that, because the written statement is not part of the official minutes adopted by the body, the statement may be included as an attachment to the minutes. (See SF Good Govt. Guide, Part 3, §IV(G)(2)(b), p. 133 – 134 (2011).)

Mr. Hartz's comments were summarized in the body of the minutes as required by the Sunshine Ordinance. The Library Commission included Mr. Hartz's submitted written statement in the minutes as an attachment. The Library Commission was following the advice of the City Attorney that is consistently given to all City departments. Mr. Hartz stated that the Good Government Guide is not the law and is not a substitute for the requirements of the Sunshine Ordinance. However, City departments all rely in good faith on the advice of the City Attorney to ensure that they accurately adhere to the requirements of any law.

The Task Force stated that, as part of its basis for finding this violation, the Library Commission should have included in the minutes a notation that Mr. Hartz's statement was appended at the end of the minutes. While the Ethics Commission agrees that such a notation is advisable, it is not a requirement under the Sunshine Ordinance.

c. Mr. Hartz's right to make public comment was not abridged.

Sunshine Ordinance section 67.15(d) ensures that the public's right to speak at a policy body meeting cannot be abridged or denied by that policy body. The Task Force agreed with Mr. Hartz's contention that the Library Commission's summary of his statement in the minutes in place of his submitted written statement by the Library Commission was an abridgment of his right to public testimony.

Mr. Hartz was not denied the right to speak and he made public comment after each agenda item. The requirement to include a written statement in the minutes is not related to the requirements to allow public comment or public criticism of a policy body under section 67.15(d).

d. Ms. Gomez was not an elected 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.

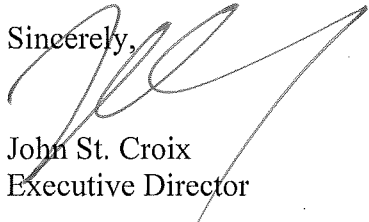
Under the Sunshine Ordinance the Ethics Commission may “handle” allegations of willful violations of the Ordinance under section 67.34. It states that the willful failure to discharge the duties of the Ordinance is deemed official misconduct, and specifically provides that the Ethics Commission can only handle complaints involving allegations of willful failure by elected officials or department heads.

Ms. Gomez is an appointed official, thus she was not an elected official or department head at the time this finding was made against her and the Ethics Commission cannot pursue any action against Ms. Gomez. Further, the original named respondent, Ms. Blackman is also not an elected official or department head. Lastly, the Library Commission is an entity and findings of official misconduct can only be made against individuals.

Moreover, the Library Commission had already included Mr. Hartz’s statement, as required and pursuant to the advice of the City Attorney, in its minutes for the September 16 meeting.

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

Sincerely,



John St. Croix
Executive Director

Enclosures

Cc: Ray Hartz, Complainant
Jewelle Gomez, Respondent
Sue Blackman, 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
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