

File No. _____

SOTF Item No. 2

CAC Item No. _____

SUNSHINE ORDINANCE TASK FORCE
AGENDA PACKET CONTENTS LIST

Sunshine Ordinance Task Force

Date: May 2, 2012

Compliance and Amendments Committee

Date: _____

CAC/SOTF

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Completed by: Andrea Ausberry Date April 25, 2012

Completed by: _____ Date _____

*An asterisked item represents the cover sheet to a document that exceeds 25 pages.
The complete document is in the file.



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MEMORANDUM

TO: Honorable Members
Sunshine Ordinance Task Force

FROM: Paula Jesson
Deputy City Attorney

DATE: March 20, 2012

RE: Twelfth Annual Report of the Supervisor of Records
October 1, 2010 – September 30, 2011

The City Attorney's Office submits this report to the Sunshine Ordinance Task Force under Section 67.21(h) of the San Francisco Sunshine Ordinance (S.F. Admin. Code §67.21(h)). That section requires the Supervisor of Records to prepare a tally and report for the Sunshine Ordinance Task Force at least annually on each petition brought before the Supervisor of Records for access to records or information. Section 67.21(h) requires as follows:

The report shall at least identify for each petition the record or records sought, the custodian of those records, the ruling of the supervisor of public records, whether any ruling was overturned by a court and whether orders given to custodians of public records were followed. The report shall also summarize any court actions during that period regarding petitions the Supervisor has decided. At the request of the Sunshine Ordinance Task Force, the report shall also include copies of all rulings made by the supervisor of public records and all opinions issued.

Reporting period: This report covers petitions brought before the Supervisor of Records between October 1, 2010 and September 30, 2011 (the "reporting period").

Court actions: No court decisions issued regarding determinations by the Supervisor of Records for the reporting period.

Orders issued: No order from the Supervisor of Records issued to any City department whose records were the subject of a petition.

DESCRIPTION OF PETITIONS AND THEIR DISPOSITION

The petitions and their disposition are set forth below. For the custodian of records, the report generally gives the name of the employee who responded to the request. An appendix with copies of the determinations is attached. In general, the appendix does not include denials based on the matter having become moot because the department provided the requested records. For more complex issues or where appropriate to provide context for the petition or the determination, the appendix may also contain additional communications regarding the petitions.

- 1. Petitioner: Peter Jamison
Department: District Attorney's Office
Records sought: Report by a legal consultant on D.N.A. evidence

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Custodian of
Records: Paul Henderson

Determination: Denied because moot – records provided

Peter Jamison asked the District Attorney's Office for a "review" or "report" by a D.N.A. consultant regarding the handling of D.N.A. evidence in a criminal case. Mr. Jamison said that the District Attorney's Office had informed him that it had no records responsive to his request, but that he believed, based on information provided by the consultant, that the District Attorney's Office had the document.

Staff from the District Attorney's Office informed us that Mr. Jamison had sent a more broadly worded request and, in response, the office had provided Mr. Jamison with an eight-page document consisting of several email messages. One of the messages contained comments by the consultant. In light of this more recent response, the Supervisor of Records found Mr. Jamison's petition moot and denied it on that ground.

Mr. Jamison then filed a second petition. He said that although the District Attorney's Office had provided a responsive document containing most of the information sought, it had not provided any cover letter, email address or other identification of the person to whom the consultant had sent the email message.

While we were reviewing this matter, the District Attorney's Office informed us that it would provide Mr. Jamison with the cover email showing the person to whom the consultant sent his email. We informed Mr. Jamison that the District Attorney's Office would provide the records that he sought. Accordingly, the petition had become moot.

2. Petitioner: Anonymous
Department: Recreation and Park Department
Records sought: Records of closed session of the Recreation and Park Commission
Custodian of Records: Olive Gong
Determination: Denied – closed session properly called and conducted; disclosure not required under Sections 67.8-1(a) or 67.12(b)(3) of the Sunshine Ordinance
Appendix: Pages 1-3

An anonymous petitioner asked the Recreation and Park Department for a copy of the recording of a closed session of a Recreation and Park Commission meeting. The Department declined to disclose the recording based on the attorney client privilege (California Government Code Section 6254(k) and California Evidence Code Section 954.). The petitioner filed a

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petition with the Supervisor of Records, alleging that the Department had improperly withheld the recording.

Background Information

The recording requested by the petitioner was from the Recreation and Park Commission meeting of October 7, 2010. We first describe the two agenda items relevant to the issues raised by petitioner, Agenda Items No. 9 and 10, and then the Commission's actions under each item.

Agenda Items 9 and 10

Agenda Item 9 was for a closed session to meet with legal counsel for "Anticipated Litigation (Discussion Item)/Number of potential cases: 1 (City and County of San Francisco as plaintiff.)"

Agenda Item 10 read as follows:

Discussion and possible action to approve a personal services contract with Verbij Windmill Design and Construction BV in the amount of \$206,406 [€153,188.58 Euros based on 9/27/10 exchange rate] for the renovation of the South Murphy Windmill Restoration Project. (ACTION ITEM)

Staff had prepared a staff report for Item 10. The staff report provided a detailed history of the work that the Verbij contract would cover. The summary of the staff report is as follows:

The City had entered into a contract with Bloemendal Construction Company ("Bloemendal") to restore the Murphy windmill. Bloemendal had an agreement with Verbij Windmill Design and Construction ("Verbij") to provide services as a sub-consultant. Bloemendal had completed part of the restoration work but thereafter informed the City that it could no longer continue with the project and subsequently filed for bankruptcy under Chapter 7. The City terminated the contract with Bloemendal. Thereafter, Verbij informed the City that Bloemendal had not paid it for work that it had done as a sub-consultant. Thus, the City had paid Bloemendal for certain of the services to be performed by Verbij, but Bloemendal apparently did not pass through all payments to Verbij, as Bloemendal's contract required. Verbij is located in the Netherlands and, unaware of its legal rights, did not file a stop notice or a claim against Bloemendal's payment bond, and the time to do so had expired.

Department staff recommended that the Commission approve the Verbij contract because Verbij had possession of parts needed to complete the restoration, had performed the necessary restoration work (the City already had possession of most of the restored pieces), and was willing and able to perform the remaining work and to deliver the parts still in its possession, but not before receiving payment for work that it had already done.

Commission actions on Agenda Items 9 and 10

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At the conclusion of the closed session held under Item 9, a deputy city attorney who had participated in the closed session opened the door to the hearing room to invite in members of the public. But no member of the public attended the rest of the meeting. Convening again in open session, the Commission voted not to disclose any part of the closed session.

The Secretary then called Item 10, approval of the Verbij contract. The Chair made the following comment: "... and is there anyone outside that wants to come back in and hear this wonderful decision?" The Commission, without further discussion of the item, approved it.

Petitioner's Arguments

The petitioner made the following arguments:

Argument No. 1. If the Commission held the closed session to consider litigation against Bloemendal, the Commission could not properly meet in closed session for this purpose. San Francisco Administrative Code Section 67.10 permits a closed session when discussion with legal counsel in open session about the anticipated litigation would likely and unavoidably prejudice the position of the City. The statute of limitations on filing a claim in the bankruptcy proceeding expired shortly after Bloemendal entered Chapter 7 bankruptcy without the City's filing a claim. No prejudice would arise from discussing the matter in open session.

Argument No. 2. Section 67.8-1(a) of the San Francisco Administrative Code ("Section 67.8-1(a)") requires disclosure. That Section provides that recordings of closed sessions held to discuss anticipated litigation with legal counsel "shall be released to the public in accordance with any of the following provisions: TWO years after the meeting if no litigation is filed; [or] UPON EXPIRATION of the statute of limitations for the anticipated litigation if no litigation is filed; [or] as soon as the controversy leading to anticipated litigation is settled or concluded." Because the statute of limitations on filing a claim in the bankruptcy proceeding has expired, Section 67.8-1(a) requires disclosure of the closed session recording.

Argument No. 3. If the Commission held the closed session to consider litigation against Verbij, approval of the Verbij contract (Item 10 on the agenda) constitutes removal of the underlying dispute with Verbij. Therefore, both Section 67.8-1(a) and San Francisco Administrative Code Section 67.12(b)(3) require disclosure of the closed session recording. The latter section provides that where disclosure of certain documents in a litigation matter that has been settled could adversely affect the City's interest in pending litigation involving a different party but the same facts, disclosure of the documents may be delayed until the pending litigation is settled or otherwise concluded.

Argument No. 4. The Commission improperly subsumed a complete discussion of approval of the Verbij contract in Item 10 within the closed-door session, and then failed to repeat any portion of the discussion upon return to open session. Disclosure of the recording of the closed session is necessary to correct this "serious omission."

Determination

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In making his arguments, the petitioner had access to limited information. As permitted by State and local laws governing a closed session on anticipated litigation, the Commission agenda does not identify the nature of the litigation or the potential defendant. Anyone challenging the validity of the closed session must therefore, of necessity, make assumptions about the purpose of the closed session and the substance of the discussions that occurred.

The Supervisor of Records carefully reviewed the recording of the Commission's closed session in light of petitioner's arguments. She determined that the Commission lawfully called, and lawfully conducted, the closed session. She therefore rejected the four arguments raised by the petitioner.

Having done so, the Supervisor of Records found that she too faced a practical difficulty. To give an explanation of the reason for the determination would reveal the nature and substance of the closed session, a disclosure prohibited by the laws protecting its confidentiality. For a closed session on anticipated litigation, the laws protecting the information include those requiring attorneys to protect the confidences of their clients. (Evid. Code §950 *et seq.*; Bus. and Prof. Code §6068(e)(1); Rules of Professional Conduct, Rule 3-100.) Accordingly, the Supervisor of Records was constrained by these laws and required to respond in a conclusory manner, not addressing the specifics of petitioner's arguments or commenting on the accuracy of the assumptions behind them.

As noted above, the petitioner had argued that even if the closed session were lawfully called and conducted, Sections 67.8-1(a) and 67.12(b)(3) of the San Francisco Sunshine Ordinance require disclosure of the recording of the session. As noted, Section 67.8-1(a) requires disclosure of a recording of a closed session upon the earliest of the following: two years if no litigation is filed, expiration of the statute of limitations for the anticipated litigation if no litigation is filed, or as soon as the controversy leading to anticipated litigation is concluded or settled. Section 67.12(b)(3) provides that where disclosure of certain documents in a litigation matter that has been settled could adversely affect the City's interest in pending litigation involving a different party but the same facts, disclosure of the documents may be delayed until the pending litigation is settled or otherwise concluded.

The Supervisor of Records considered these provisions of the Sunshine Ordinance when reviewing the recording of the closed session. The Supervisor of Records determined that there remain causes of action that the City could bring against the potential defendant in this matter that are not time-barred. Therefore, Section 67.8-1(a) does not apply. The Supervisor of Records also determined that Section 67.12(b)(3) does not require disclosure.

3. Petitioner: Kimo Crossman
- Department: Office of the Assessor-Recorder
- Records sought: Records relating to reward program for information about underpayment of property taxes
- Custodian of Records: David Chai

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Determination: Denied – response not overdue

City law authorizes the Assessor to recommend a reward for information leading to the detection of an underpayment of property taxes. (S.F. Admin. Code §10.177-2.) Mr. Crossman asked the Office of the Assessor-Recorder on January 19, 2011, for records relating to this program. On January 24, 2011, Mr. Crossman filed a petition to the Supervisor of Records stating that the Assessor had not responded. Based on a review of the history of communications forwarded by Mr. Crossman, the Supervisor of Records determined that the Assessor's response was not yet due. The Assessor had informed Mr. Crossman on January 28, 2011, that it was invoking an extension of time to respond and anticipated doing so by a date still in the future, February 14, 2011. When the Supervisor of Records pointed this out to Mr. Crossman, he acknowledged that the response was not overdue.

4. Petitioner: Rita O'Flynn
- Department: Contractor for Human Services Agency, Tenderloin Housing Clinic
- Records sought: Audited financial reports
- Custodian of Records: Pamela Tebo responded to separate request to the Human Services Agency for the same records
- Determination: Denied because moot – records provided

Ms. O'Flynn submitted a request to the Tenderloin Housing Clinic ("THC") for its audited financial reports for the fiscal year ending June 2010. The THC refused to provide the reports.

The THC has a contract with the Human Services Agency. The contract requires the THC to comply with Chapter 12L of the San Francisco Administrative Code. Chapter 12L requires nonprofit organizations to make available for public inspection certain financial information about the organization, including 'any financial audits . . . performed by or for the City . . . pursuant to a contract between the City and the nonprofit organization' (S.F. Admin. Code §12L.5(a).)

It is not clear whether the Supervisor of Records has jurisdiction to consider petitions alleging that a nonprofit contractor of the City subject to Chapter 12L of the San Francisco Administrative Code has improperly withheld a record under that Chapter. Chapter 12L includes procedures for dispute resolution. It authorizes a member of the public to submit a complaint to the City department that administers the contract and, after that complaint process is done, to seek an advisory opinion from the Sunshine Ordinance Task Force. The complainant may also ask that the Board of Supervisors review the City department's resolution of the complaint and make a determination that is nonbinding on the nonprofit. The Board of Supervisors adopted Chapter 12L in 1998, the year before the voters approved an amended version of the Sunshine Ordinance creating the function of the Supervisor of Records.

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The Supervisor of Records found it unnecessary to decide this jurisdictional issue under Chapter 12L and the Sunshine Ordinance. Ms. O'Flynn had also requested the THC reports from the Human Services Agency, which made the requested records available to her. Accordingly, the Supervisor of Records determined that the petition had become moot.

5. Petitioner: Patrick Tobin
Department: San Francisco Police Department
Records sought: "Like Work Like Pay" Cards
Custodian of Records: Alice Villagomez
Determination: Denied because moot – records provided

Patrick Tobin requested the following records from the Police Department:

Copies of all submitted "Like Work Like Pay" (hereafter LWLP) cards, front and back, submitted to your office for compensation by any and all members of the San Francisco Police Department since June 1, 2009.

The Police Department denied the request and Mr. Tobin filed a petition with the Supervisor of Records.

After reviewing the matter, the Supervisor of Records informed Mr. Tobin by e-mail that the records he had requested are public records. She also informed him that she had learned that Maureen Conefrey of the San Francisco Police Department had responded to his request for the records by sending him a spreadsheet of "Like Work Like Pay" information from June 1, 2009 to April 20, 2011 (a copy of which she attached to the e-mail message). The record that Ms. Conefrey provided had summarized the information contained on the cards, including the names of the individuals and the date and hours worked. The Supervisor of Records asked Mr. Tobin to confirm whether his being provided with this record satisfied his request.

Thereafter, the Supervisor of Records discussed the issue with Mr. Tobin by telephone. She informed Mr. Tobin that the "Like Work Like Pay" cards are kept in numerous separate facilities and in numerous separate files, rather than in a centralized location. Mr. Tobin informed the Supervisor of Records that the spreadsheet had partially satisfied his request and that he would send a newly focused and narrowed request. He sent a revised request for records, or a summary, listing the names and titles of officers whom the listed individuals on the Police Department's "Like Work Like Pay" spreadsheet were "working in the place of" on the dates indicated on the spreadsheet." The Supervisor of Records forwarded the revised request to the Police Department for a response. Mr. Tobin raised no further issue with the Supervisor of Records regarding the matter.

6. Petitioner: Rita O'Flynn

Memorandum

TO: Honorable Members
Sunshine Ordinance Task Force
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Department: Mayor's Office of Housing
Records sought: Lead Hazard Program Records
Custodian of
Records: Eugene Flannery and Oliver Hack
Determination: Denied because moot – records provided

Rita O'Flynn asked the Mayor's Office of Housing ("MOH") for 15 properties, identified by address, in the MOH Lead Hazard Program. Not satisfied with MOH's response to the request, Ms. O'Flynn filed a petition with the Supervisor of Records.

Ms. O'Flynn provided the Supervisor of Records with e-mail messages reflecting a number of communications with Eugene Flannery over a period of about three weeks regarding her request. The e-mail show that Mr. Flannery and Ms. O'Flynn had discussed the manner and timing of MOH's production of the requested records. The e-mail also included complaints by Ms. O'Flynn of MOH not responding to a verbal request and, once the request was in writing, not responding to the written request. She also complained of MOH's not providing a definitive time frame for producing the records; exceeding permissible deadlines for responding to her request; asserting that the amount of requested records was voluminous; and refusing to provide verbal updates on the status of the request.

In the course of reviewing the issues with MOH, we learned from Oliver Hack of MOH that the department had made responsive records available to Ms. O'Flynn. We confirmed with Ms. O'Flynn that MOH had provided the records and that she did not need further assistance from the Supervisor of Records regarding the matter.

7. Petitioner: Rita O'Flynn
Department: Mayor's Office of Housing
Records sought: Deleted e-mails regarding Lead Hazard Program
Custodian of
Records: Oliver Hack
Determination: Denied because of the limited role of the Supervisor of Records

In March of 2008, Rita O'Flynn asked to review the file regarding MOH's lead abatement grant to fund lead-removal work on property owned by Ms. O'Flynn. Thereafter, she asked MOH to provide her a copy of the file. After MOH did so, Ms. O'Flynn concluded that the copy did not include e-mail communications from her previous review of the file, including e-mail of MOH employee Myrna Melgar. She then asked MOH for all e-mail messages regarding the lead abatement grant for her property. MOH informed Ms. O'Flynn that MOH had deleted the e-mails because they were more than two years old. MOH also informed her that the deletion was permitted under MOH's records retention policy.

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MOH thereafter requested that Department of Technology to restore Ms. Melgar's email messages. The Department of Technology did so and provided MOH with five CDs which contained Ms. Melgar's e-mail for several years (roughly, 2004 to 2009). MOH reviewed the CDs and found 26 pages of responsive records, which it provided to Ms. O'Flynn.

Ms. O'Flynn was concerned that MOH had either failed to provide all responsive records from the restored e-mail or had failed to request or obtain all relevant records from the Department of Technology. She filed a petition with the Supervisor of Records, asking for a review of those issues.

The Supervisor of Records denied Ms. O'Flynn's petition. The role of the Supervisor of Records is to determine whether a record that has been requested is public. This function is based on the assumption that a City department has located a record but is withholding it based on an exception set forth in the Sunshine Ordinance or other applicable law. The role of the Supervisor of Records is to determine whether the City department is lawfully relying on the claimed exception, not to rule on the adequacy of a department's search for records. For this reason, the Supervisor of Records does not address a complaint that a City department has not adequately searched for records in response to a public records request.

However, the practice of this office when it receives a petition raising this issue is to discuss it with the department. We therefore discussed Ms. O'Flynn's concerns with MOH's Chief Operating Officer, Oliver Hack, who searched the restored e-mails again for any of Ms. Melgar's e-mail. He found two additional messages that may not have been provided to Ms. O'Flynn earlier because they did not relate to her property and therefore may not have fallen within a category of records that were requested.

When the Supervisor of Records notified Ms. O'Flynn of the denial of her petition because of the limited role of the Supervisor of Records, described above, she also informed Ms. O'Flynn that, as a general rule, departments need not search their back-up electronic files in response to a public records request. See the City Attorney's *Good Government Guide*, p. 89: "Back-up tapes serve the limited purpose of providing a means of recovery in cases of disaster, departmental system failure, or unauthorized deletion. They are not available for departmental use except in these limited situations. Electronic records such as e-mails that an employee has properly deleted under the department's records retention and destruction policy but that remain on back-up tapes are analogous to paper records that the department has lawfully discarded but may be found in a City-owned dumpster. Neither the Public Records Act nor the Sunshine Ordinance requires the City to search the trash for such records, whether paper or electronic."

8. Petitioner: Peter Jamison
- Department: District Attorney's Office and Police Department
- Records sought: Correspondence between employees of the Police Department and the District Attorney's Office
- Custodian of Records: Cristine Soto DeBerry and Maureen Conefrey
- Determination: Denied because of the limited role of the Supervisor of Records

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On June 2 and August 24, 2011, respectively, Peter Jamison submitted public records requests to the District Attorney's Office and to the Police Department for correspondence between Russ Giuntini, former chief attorney of the District Attorney's Office, and Jeff Godown and/or David Lazar of the San Francisco Police Department between March 1, 2010 and May 1, 2010. Both the District Attorney's Office and the Police Department informed Mr. Jamison that they had no responsive records.

Mr. Jamison filed a petition with the Supervisor of Records, stating that Rockne Harmon had informed him that Russ Giuntini sent an e-mail to both Jeff Godown and David Lazar on April 12, 2010, and that Mr. Harmon – who had a copy of the email – dictated its text to Mr. Jamison over the phone.

For the reasons discussed with respect to the previous petition, the role of the Supervisor of Records is to determine whether the City department is lawfully relying on the claimed exception, not to rule on the adequacy of a department's search for records. In light of this limited purpose, the Supervisor of Records denied Mr. Jamison's petition.

However, consistent with the practice of this office described above, we discussed Mr. Jamison's complaint with both the District Attorney's Office and the Police Department and received information from them that we passed on to the petitioner.

Katherine Miller of the District Attorney's Office provided the following information. As part of the office's standard practice when an employee leaves the office, the District Attorney's office manager sends a memo to human resources and technical staff. The memo provides notice of the employee's departure and directs, among other things, that staff remove the employee's City accounts for telephone, email and computer services. This procedure results in the removal of the employee's email account and the deletion of any email still remaining on the office's computer email system for that employee. These actions are normally taken within a week of the notification to human resources and technical staff. But because Mr. Giuntini had served as Chief Assistant District Attorney, the office temporarily delayed discontinuing his accounts to make sure that incoming calls and messages were reviewed and appropriately referred and that the office would continue to get legal subscriptions that had been sent to him. Because of this delay, the office still had access to Mr. Giuntini's email when Mr. Jamison made earlier requests in November and December of 2010 for certain of his email messages. The issues regarding Mr. Jamison's November/December requests were resolved by April 15, 2011 and the District Attorney's Office believed that this line of inquiry was resolved as it had provided the email documents that had been requested. As there was no further office need to preserve the account, in late April, using the procedure described above, the District Attorney's Office removed the various accounts for Mr. Giuntini, which included the deletion of his email messages. For this reason, the District Attorney's Office did not have email records responsive to Mr. Jamison's June 2, 2011 request.

The San Francisco Police Department informed us that it was reviewing its email records again in light of Mr. Jamison's petition. Captain Greg McEachern said that he would inform Mr. Jamison when the office had finished this further review and whether it had been able to locate any responsive records.

9. Petitioner: Che L. Hasim

Memorandum

TO: Honorable Members
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DATE: March 20, 2012
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RE: Twelfth Annual Report of the Supervisor of Records
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Department: San Francisco Municipal Transportation Agency
("SFMTA")
Records sought: Specifications for a recording system used in the taxi
industry
Custodian of
Records: Jarvis Murray
Determination: Moot – the Department provided the records

Che L. Hashim asked the SFMTA for records related to the approval of the Janus V2 recording system in the San Francisco taxicab industry. The SFMTA provided records in response to his request. Mr. Hashim then became aware of an SFMTA letter addressed to another person and he concluded from that letter that there were documents that were responsive to his request that the SFMTA had not provided to him. He then filed a petition to the Supervisor of Records. The Supervisor of Records discussed the matter with SFMTA staff, who reviewed their files and were able to locate several additional responsive records, which the Supervisor of Records sent to Mr. Hashim.

P.J.

APPENDIX

TO

TWELFTH ANNUAL REPORT OF THE SUPERVISOR OF RECORDS

OCTOBER 1, 2010 – SEPTEMBER 30, 2011

CITY AND COUNTY OF SAN FRANCISCO



DENNIS J. HERRERA
City Attorney

OFFICE OF THE CITY ATTORNEY

PAULA JESSON
Deputy City Attorney

DIRECT DIAL: (415) 554-6762
E-MAIL: paula.jesson@sfgov.org

February 15, 2011

Anonymous Petitioner
[REDACTED]

Re: Petition to Supervisor of Records - Recreation and Park Commission
Closed Session

Dear Anonymous Petitioner:

On December 17, 2010, the Supervisor of Records received your petition alleging that the Recreation and Park Department had improperly withheld the recording of a closed session of a Recreation and Park Commission meeting. The Department informed you that it was withholding the recording based on the attorney client privilege (California Government Code Section 6254(k) and California Evidence Code Section 954.)

Background Information

The agenda for the Recreation and Park Commission meeting of October 7, 2010 contained two items that are relevant to the disposition of your petition. The first was Item 9, a closed session to meet with legal counsel for "Anticipated Litigation (Discussion Item)/Number of potential cases: 1 (City and County of San Francisco as plaintiff)." The second was Item 10 that the agenda described as:

Discussion and possible action to approve a personal services contract with Verbij Windmill Design and Construction BV in the amount of \$206,406 [€153,188.58 Euros based on 9/27/10 exchange rate] for the renovation of the South Murphy Windmill Restoration Project. (ACTION ITEM)

The staff report for Item 10 provided a detailed history of the work that the Verbij contract would cover. To summarize briefly, the City had entered into a contract with Bloemendal Construction Company ("Bloemendal") to restore the Murphy windmill. Bloemendal had an agreement with Verbij Windmill Design and Construction ("Verbij") to provide services as a sub-consultant. Bloemendal had completed part of the restoration work but thereafter informed the City that it could no longer continue with the project and subsequently filed for bankruptcy under Chapter 7. The City terminated the contract with Bloemendal. Thereafter, Verbij informed the City that Bloemendal had not paid it for work that it had done as a sub-consultant. Thus, the City had paid Bloemendal for certain of the services to be performed by Verbij, but Bloemendal apparently did not pass through all payments to Verbij, as Bloemendal's contract required. Verbij is located in the Netherlands and, unaware of its legal rights, did not file a stop notice or a claim against Bloemendal's payment bond, and the time to do so has expired.

Department staff recommended that the Commission approve the Verbij contract because Verbij has possession of parts needed to complete the restoration, has performed the necessary restoration work (the City already had possession of most of the restored pieces), and is willing and able to perform the remaining work and to deliver the parts still in its possession, but not before receiving payment for work it had done but not been paid for.

CITY HALL • 1 DR. CARLTON B. GOODLETT PLACE, ROOM 234 • SAN FRANCISCO, CALIFORNIA 94102
RECEPTION: (415) 554-4700 FACSIMILE: (415) 554-4699

Letter to Anonymous Petitioner
[REDACTED]

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At the conclusion of the closed session, a deputy city attorney who had participated in it opened the door to the hearing room to invite in members of the public. But no member of the public had stayed for the rest of the meeting. Convening again in open session, the Commission voted not to disclose any part of the closed session.

The Secretary then called Item 10, approval of the Verbij contract. The Chair made the following comment: "... and is there anyone outside that wants to come back in and hear this wonderful decision?" The Commission, without further discussion of the item, approved it.

Issues to be Resolved

We summarize your arguments:

1. If the Commission held the closed session to consider litigation against Bloemendal, the Commission could not properly meet in closed session for this purpose. San Francisco Administrative Code Section 67.10 permits a closed session when discussion with legal counsel in open session about the anticipated litigation would likely and unavoidably prejudice the position of the City. The statute of limitations on filing a claim in the bankruptcy proceeding expired shortly after Bloemendal entered Chapter 7 bankruptcy without the City's filing a claim. No prejudice would arise from discussing the matter in open session.

2. Section 67.8-1(a) of the San Francisco Administrative Code ("Section 67.8-1(a)") requires disclosure. That Section provides that recordings of closed sessions held to discuss anticipated litigation with legal counsel "shall be released to the public in accordance with any of the following provisions: TWO years after the meeting if no litigation is filed; UPON EXPIRATION of the statute of limitations for the anticipated litigation if no litigation is filed; as soon as the controversy leading to anticipated litigation is settled or concluded." Because the statute of limitations on filing a claim in the bankruptcy proceeding has expired, Section 67.8-1(a) requires disclosure of the closed session recording.

3. If the Commission held the closed session to consider litigation against Verbij, approval of the Verbij contract (Item 10 on the agenda) constitutes removal of the underlying dispute with Verbij. Therefore, both Section 67.8-1(a) and San Francisco Administrative Code Section 67.12(b)(3) require disclosure of the closed session recording. The latter section provides that where disclosure of certain documents in a litigation matter that has been settled could adversely affect the City's interest in pending litigation involving a different party but the same facts, disclosure of the documents may be delayed until the pending litigation is settled or otherwise concluded.

4. The Commission improperly subsumed complete discussion of approval of the Verbij contract in Item 10 within the closed-door session, and then failed to repeat any portion of the discussion upon return to open session. Disclosure of the recording of the closed session is necessary to correct this "serious omission."

Determination

The Supervisor of Records has listened to the recording of the Recreation and Park Commission's October 7, 2010 closed session in light of the issues you raise.

In making these arguments, you necessarily do so with limited information. As permitted by State and local laws governing a closed session on anticipated litigation, the Commission agenda does not identify the nature of the litigation or the potential defendant. Therefore, you must of necessity make assumptions about the purpose of the closed session and the substance of the discussions that occurred.

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The Supervisor of Records has carefully reviewed the recording of the Commission's closed session and has determined that the Commission lawfully called, and lawfully conducted, the closed session. Therefore, we reject your arguments 1 and 4 as summarized above.

Having done so, the Supervisor of Records also faces a practical difficulty. To give an explanation of the reason for the determination would reveal the nature and substance of the closed session, a disclosure prohibited by the laws protecting its confidentiality. For a closed session on anticipated litigation, the laws protecting the information include those requiring attorneys to protect the confidences of their clients. (Evid. Code §950 *et seq.*; Bus. and Prof. Code §6068(e)(1); Rules of Professional Conduct, Rule 3-100.) Accordingly, we are constrained by these laws and required to make this response conclusory.¹ We cannot address the specifics of your arguments 1 and 4 as summarized above, or comment on the accuracy of the assumptions behind those arguments.

You also argue that even if the closed session were lawfully called and conducted, Sections 67.8-1(a) and 67.12(b)(3) of the San Francisco Sunshine Ordinance require disclosure of the recording of the session. As we have noted, Section 67.8-1(a) requires disclosure of a recording of a closed session upon the earliest of the following: two years if no litigation is filed, expiration of the statute of limitations for the anticipated litigation if no litigation is filed, or as soon as the controversy leading to anticipated litigation is concluded or settled. Section 67.12(b)(3) provides that where disclosure of certain documents in a litigation matter that has been settled could adversely affect the City's interest in pending litigation involving a different party but the same facts, disclosure of the documents may be delayed until the pending litigation is settled or otherwise concluded.

The Supervisor of Records has also considered these provisions of the Sunshine Ordinance when reviewing the recording of the closed session. The Supervisor of Records has determined that there remain causes of action that the City could bring against the potential defendant in this matter that are not time-barred. Therefore, Section 67.8-1(a) does not apply. The Supervisor of Records has also determined that Section 67.12(b)(3) does not require disclosure. Thus, we reject your arguments 2 and 3 as summarized above. But again, for the reasons stated above, we cannot address the specifics of those arguments or comment on the accuracy of the assumptions behind them.

Accordingly, the Supervisor of Records denies your petition.

Very truly yours,

DENNIS J. HERRERA
City Attorney


Paula Jesson
Deputy City Attorney

¹ The San Francisco Charter and State law create attorney-client relationships between the City Attorney and City officials. Charter §6.102. Circumstances may arise where disclosure of information from a closed session held to confer with legal counsel may conflict with Charter and State law.

