

**SUNSHINE ORDINANCE
TASK FORCE**



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**ORDER of DETERMINATION
December 23, 2015**

DATE ORDER ISSUED
December 2, 2015

**CASE TITLE – Richard Denton. V. San Francisco Public Utilities Commission
(File No. 15078)**

FACTS OF THE CASE

On May 15, 2015, Richard Denton (Complainant) filed a complaint with the Sunshine Ordinance Task Force (SOTF) alleging that the San Francisco Public Utilities Commission (PUC) violated Administrative Code (Sunshine Ordinance), Section 67.21, by failing to respond to a public records request in a timely and/or complete manner.

HEARING ON THE COMPLAINT

On July 21, 2015, the SOTF Complaint Committee referred the matter to the SOTF with recommendations that there were no violations.

On August 5, 2015, the SOTF reviewed and rejected the Complaint Committee's recommendation and scheduled a *de novo* hearing on the matter.

On October 7, 2015, the SOTF held a *de novo* hearing. Mr. Denton provided an overview of the complaint and requested the SOTF to find violations. There were no speakers in support of the Complainant. Suzanne Gautier, PUC, provided a summary of the department's position. Tonia Lediju, Controller's Office, provided information regarding the whistleblower program. There were no speakers in support of the Respondent. A question and answer period followed. The Respondent provided a rebuttal. The Complainant provided a rebuttal.

Upon discussion, it appears that the PUC altered a report and did not inform the Complainant that the version provided was revised.

Member Rumold, seconded by Member Hinze, moved to find a violation of Administrative Code (Sunshine Ordinance), Sections 67.21(a) and (b), 67.26, and 67.27 for failure to disclose a reason for withholding and failure to provide justification for withholding records. Member Rumold requested that the vote on the violations be delayed to allow time for him to draft a comprehensive Order of Determination and insert explanatory language as to how the Sunshine Ordinance, Sections 67.21(a) and (b), 67.26, and 67.27 were violated.

FINDINGS OF FACT AND CONCLUSION OF LAW

Based on the testimony and evidence presented, the SOTF finds that a violation of Administrative Code (Sunshine Ordinance), Sections 67.21(b), 67.26, and 67.27 occurred.

The Complaint arises from an unusual factual scenario, which requires some elaboration. The following is a summary, based on documents submitted and testimony provided to the SOTF during the October 7, 2015 hearing on the matter.

Mr. Denton's complaint alleged as follows:

On November 1, 2013, I submitted an open records request to the PUC for "Any and all reports evaluating lighting, energy efficiency, or health and safety conditions at Broadway Tunnel for the PUC since January 2010." In particular I requested a copy of a safety report submitted to the City Controller's office (October 18, 2013). Initially, the PUC refused to produce claiming the report was confidential. I appealed to the Supervisor of Records Paula Jesson, who asked if a redacted version of the report would be acceptable and I replied that it would not (except for person's names). On December 2, 2013, Ms. Jesson wrote that the PUC had dropped its objections and I could obtain the report.

The PUC produced a report concerning lighting issues in the Broadway Tunnel (the "Altered Report") to Mr. Denton and closed the matter.

Two years later, as part of an employment lawsuit stemming, according to Mr. Denton, from his complaints about lighting levels in the Broadway Tunnel, Mr. Denton obtained a copy of the Altered Report directly from the outside engineering firm the city had hired to produce the report (the "Original Report"). The Original Report was different in certain respects from the Altered Report that had been produced in response to Mr. Denton's records request to the PUC.

Mr. Denton's complaint alleged the Original Report had been changed in the following ways:

- (1) The "last modified" date on the two reports were different;
- (2) 6 pages of the report had been modified;
- (3) "300+ words had been changed"; and
- (4) The file size of the two reports were different.

Significantly, Mr. Denton alleged that the alterations were made intentionally in order to hide information of "vital importance to the public interest." At the hearing, Mr. Denton alleged that the changes to the Original Report were done, first, to conceal the fact that a whistleblower had filed a complaint about lighting in the Broadway Tunnel; and,

second, to alter the conclusions of the Original Report in order to discount or minimize the threat posed to public safety by the Tunnel's lighting.

At the hearing and in response to the complaint, Ms. Gautier and the PUC acknowledged that the Altered Report differed from the Original Report. The changes, according to Ms. Gautier, were made on advice from the Controller's Office and were primarily done to conceal the fact that a complaint had been filed about the lighting levels in the Tunnel. As another employee of the PUC asserted in responding to the complaint:

Since [the Original Report] made references to the whistleblower's complaint [concerning lighting in the Broadway Tunnel], it was deemed prudent by the [Whistleblower's Office] that any references to the whistleblower or their complaint be removed, before this report was made public. This was done to protect the confidentiality of the whistleblower and their complaint. I then directed Mr. Keith Kosiba of Studio 321 to edit the [Original Report] to effect these changes. In this manner the report could be made public without changing any of the technical content, while protecting the whistleblower. Mr. Kosiba proceeded to make only these changes. These changes account for the 300 or so words referenced by Mr. Denton].

At the hearing on the complaint, Ms. Lediju represented that whistleblower complaints are treated confidentially and that three provisions of law justified the PUC's decision to produce an amended report in response to Mr. Denton's request.

The first of those provisions is Cal. Gov. Code § 53087.6, which provides, in relevant part, that:

Any investigative audit . . . shall be kept confidential, except to issue any report of an investigation that has been substantiated, or to release any findings resulting from a completed investigation that are deemed necessary to serve the interests of the public. In any event, the identity of the individual or individuals reporting the improper government activity, and the subject employee or employees shall be kept confidential.

Second, San Francisco Charter Appendix F, Section 1.110(b) provides:

Notwithstanding any other provision of this Charter, or any ordinance or regulation of the City and County of San Francisco, and except to the extent required by state or federal law, all drafts, notes, preliminary reports of Controller's benchmark studies, audits, investigations and other reports shall be confidential.

Third, San Francisco Campaign and Governmental Code, Section 4.123 provides:

Every officer and employee of the City shall keep confidential . . . complaints or reports to the Whistleblower Program and information related to the investigation of the matter, including drafts, notes, preliminary reports, working papers, records of interviews, communications with complainants and witnesses, and any other materials and information gathered or prepared in the course of the investigation.

In sum, these three provisions afford a high degree of confidentiality—both for the identities of whistleblowers and the reports and investigations stemming from whistleblower complaints.

Nevertheless, in this case, we believe the Controller’s Office—and, by extension, the PUC—asserted these (admittedly broad) confidentiality provisions more broadly than the law allows.

Central to this complaint is whether the PUC’s decision to release the Altered Report—instead of a redacted version of the Original Report, or without acknowledging the existence of the Original Report—was justified.

At the SOTF hearing, the Controller’s Office asserted the PUC’s response was proper because it was not feasible to release a redacted version of the Original Report—or, indeed, to even assert one of the above confidentiality provisions as a justification for withholding the report—because doing so would tacitly acknowledge that a whistleblower complaint had been filed. Both § 53087.6 and Article 4.123,¹ read broadly, could countenance such blanket confidentiality—that is, to refuse to respond to a request to avoid confirming the fact that a whistleblower complaint has been filed. But nothing in the text of those provisions would appear to *require* such a response. In particular, both provisions contain exceptions that authorize the release of information—so long as the identity of the whistleblower is protected—where it is in the public’s interest, § 53087.6(e)(2), or where it would help inform the public about the Controller’s actions in responding to the complaint, Article 4.123(c).

We believe that, in this case, responding to Mr. Denton’s request in a forthright manner more effectively navigates the disclosure requirements of the Sunshine Ordinance and the confidentiality required for whistleblower complaints.

First, Mr. Denton was the source of the whistleblower complaint in the first place. Under these facts—a whistleblower seeking public disclosure of the investigation of his

¹ San Francisco Charter Appendix F, Section 1.110(b) applies to the confidentiality of records, only, not the fact of investigations. Accordingly, its confidentiality is more narrow than that provided by the other two provisions.

complaint—it is difficult to understand why the Controller’s Office believed it necessary to assert the maximum confidentiality the law could conceivably afford. Second, we believe offering misleading responses to public record requests in order to conceal the existence of an investigation is rarely, if ever, appropriate. The Controller’s Office, or other City agencies in possession of records related to a whistleblower complaint, are free to withhold documents in full, where necessary, to protect whistleblowers and the investigation of their complaints. But attempting to conceal the existence of investigations from the public hardly instills confidence in the complaint process or the actions of City agencies. Indeed, as this case amply demonstrates, this brand of concealment leads to skepticism and uncertainty in the efficacy of the whistleblower process as a whole.

Accordingly, in order to comply with the Sunshine Ordinance, the PUC should have either redacted information from the Original Report that contained references to the whistleblower complaint, then released the balance of the Report; or PUC could have released the Altered Report and alerted Mr. Denton that a second, responsive document was being withheld, in full or in part, pursuant to one of the above confidentiality provisions. Changing the Original Report in order to conceal its existence was not a suitable alternative. This failure constitutes a violation of 67.21(b) (failure to respond to a request), 67.26 (failure to segregate and release non-exempt information), and 67.27 (failure to provide a justification for withholding).

One final issue merits attention. At the hearing on the complaint, Mr. Denton alleged that the changes to the Original Report were done in order to conceal safety concerns about the lighting in the Broadway Tunnel—the very basis for the whistleblower’s complaint in the first place. Such actions, in combination with the already-identified deficiencies under the Sunshine Ordinance, would be truly concerning. However, after reviewing the two reports and the altered portions identified by Mr. Denton, it appears the PUC’s changes were primarily directed at portions of the report that referenced the whistleblower complaint. Although a limited number of changes were directed at text unrelated to the complaint, none substantially changed the report’s ultimate conclusions. Accordingly, we do not believe this complaint raises the type of bad faith that would otherwise warrant a referral to the Ethics Commission.

DECISION AND ORDER OF DETERMINATION

The Sunshine Ordinance Task Force finds that the San Francisco Public Utilities Commission violated Administrative Code (Sunshine Ordinance), Section 67.21(b), 67.26, and 67.27 by failing to produce public records, for failing to segregate and release non-confidential information, and for failure to provide a justification for withholding records.

This Order of Determination was adopted by the Sunshine Ordinance Task Force on December 2, 2015, by the following vote:

Ayes: 8 - Rumold, Eldon, Wolf, Pilpel, Fischer, Hinze, Hyland, Washburn
Noes: 0 - None
Absent: 3 - Chopra, Hepner, Haines

A handwritten signature in blue ink that reads "Allyson M. Washburn". The signature is written in a cursive style with a large initial 'A'.

Allyson Washburn, Chair
Sunshine Ordinance Task Force

- c. Members, Sunshine Ordinance Task Force
 - Jerry Threet, Deputy City Attorney
 - Richard Denton, Complainant
 - Suzanne Gautier, Public Utilities Commission
 - Barbara Hale, Public Utilities Commission
 - Harlan Kelly, Public Utilities Commission
 - John Doyle, Public Utilities Commission
 - Ben Rosenfield, Controller
 - Tonia Lediju, Controller's Office