

Date: April 9, 2008

Item No. 5
File No. 08006

SUNSHINE ORDINANCE TASK FORCE

Compliance and Amendments Committee

AGENDA PACKET CONTENTS LIST*

- Order Of Determination of: Kimo Crossman vs City Attorney's Office
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Completed by: Chris Rustom

Date: April 2, 2008

***This list reflects the explanatory documents provided**

~ Late Agenda Items (documents received too late for distribution to the Task Force Members)

** The document this form replaces exceeds 25 pages and will therefore not be copied for the packet. The original document is in the file kept by the Administrator, and may be viewed in its entirety by the Task Force, or any member of the public upon request at City Hall, Room 244.

**SUNSHINE ORDINANCE
TASK FORCE**



City Hall
1 Dr. Carlton B. Goodlett Place, Room 244
San Francisco 94102-4689
Tel. No. (415) 554-7724
Fax No. 415) 554-7854
TDD/TTY No. (415) 554-5227

ORDER OF DETERMINATION

DATE THE DECISION ISSUED

March 27, 2008

KIMO CROSSMAN v. SAN FRANCISCO CITY ATTORNEY'S OFFICE AND THE SUPERVISOR OF RECORDS (08006)

FACTS OF THE CASE

On November 30 2007, Kimo Crossman (Crossman) made an Immediate Disclosure Request ("IDR") for public records with Matt Dorsey of the City Attorney's Office. Crossman's IDR requested all materials related to a DCA Buck Delventhal meeting on 10/9/07 re: Board of Supervisors Sunshine Task Force Hearings re: Supervisor Peskin and Maxwell and any materials or communications before or after this meeting relating to the matters discussed. Kimo Crossman also requested a 15-minute phone call with DCA Delventhal to obtain oral public information.

On December 4, 2007, Alexis Thompson responded on behalf of the City Attorney's Office ("CAO") and based under Section 6253(c) of the Public Records Act and Section 67.25(b) of the Sunshine Ordinance, the CAO invoked an extension of time not to exceed 14 days to respond to the IDR.

Crossman claimed that he did not receive the records even after the extension. On 1/3/08, Crossman petitioned the Supervisor of Records from the City Attorney's Office and asked for a determination. DCA Paula Jesson responded to the request. Crossman stated that DCA Jesson's response was that Kimo Crossman would have to wait until the City Attorney's Office completes their review of records.

COMPLAINT FILED

On November 6, 2007, Crossman filed a complaint against City Attorney's Office and on February 12, 2008 amended his complaint to include the Supervisor or Records alleging violations of Sections 67.1, 67.25(d), 67.26, 67.27, 67.21(a) and (b), (i), (l), 67.24(d), and 67.34 of the Sunshine Ordinance and State Government Code Sections 6253, and 6255.

HEARING ON THE COMPLAINT

On March 25, 2008, Complainant Crossman appeared before the Task Force and presented his complaint, specifically focusing on the redaction of attorney-client privilege and/or work product materials from e-mails that were belatedly produced by the CAO and failure of Mr. Deventhal to schedule a 15 minute phone conversation under 67.22(e). Respondent Agency was represented by Alexis Thompson who presented the Agency's defense.

The issue in the case is whether the Agency violated Section(s) 67.1, 67.21, 67.22, 67.26, 67.27, 67.29-5 and/or 67.34 of the Ordinance and/or Sections 6253 and/or 6255 of the California Public Records Act.

ORDER OF DETERMINATION

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based on the testimony and evidence presented the Task Force finds the testimony of Kimo Crossman to be persuasive and finds that Sections 67.21 (i) and 67.24 (b)(1)(iii) to be applicable in this case with respect to the impermissible redactions being based on attorney-client privilege and work product protection. The Task Force does not find the testimony provided by the Agency persuasive to this case. The Task Force took no action regarding the alleged violation of 67.22(e).

The Task Force finds that under the plain language of the Sunshine Ordinance, the advice the CAO gave to Supervisors and their agents regarding compliance with Open Government law is not exempt from disclosures. "All communications with the City Attorney's Office with regard to this ordinance, including petitions, requests for opinion, and opinions shall be public records." See 67.21(i). "Advice on compliance with, analysis of, an opinion concerning liability under, or any communication otherwise concerning the California Public Records Act, the Ralph M. Brown Act, the Political Reform Act, any San Francisco governmental ethics code, or this Ordinance." See 67.24(b)(1)(iii).

These specific statutory enactments prevail over any other applicable state law protection, including Cal. Govt. Code § 6254(k), pursuant to the terms of the Sunshine Ordinance and the California Public Records Act. See § 67.24 (providing "enhanced right of public access to information and records"); Cal. Govt. Code § 6253(e).

DECISION AND ORDER OF DETERMINATION

The Task Force finds that the agency violated §§ 67.21 (i) and 67.24 (b)(1)(iii) of the Sunshine Ordinance for improperly redacting attorney-client privilege and work-product from the e-mails produced. The agency shall release the records requested without redactions within 5 business days of the issuance of this Order and appear before the Compliance and Amendments Committee on April 9, 2008.

This Order of Determination was adopted by the Sunshine Ordinance Task Force on March 25, 2008, by the following vote: (Comstock/Goldman)

Ayes: Craven, Knee, Cauthen, Comstock, Chan, Goldman, Williams

Noes: Pilpel

Absent: Wolfe

Excused: Chu



Doug Comstock, Chair
Sunshine Ordinance Task Force

c: Ernie Llorente, Deputy City Attorney
Kimo Crossman, Complainant
Alexis Thompson, Deputy Press Secretary



DENNIS J. HERRERA
City Attorney

ALEXIS P. THOMPSON
Deputy Press Secretary

DIRECT DIAL: (415) 554-4653
E-MAIL: alexis.truchan@sfgov.org

February 19, 2008

Re: Kimo Crossman v. City Attorney, Complaints #08004-08007

Dear Honorable Members of the Sunshine Ordinance Task Force:

This correspondence serves to address the most recent complaints filed by Mr. Kimo Crossman against the Office of the City Attorney to the Sunshine Ordinance Task Force. The complaints that are slated to be before the Task Force are #08004, #08005, #08006, and #08007.

As the Task Force is aware by receipt of correspondence between our office and Mr. Crossman, in a letter written by City Attorney Public Information Officer Matt Dorsey on January 12, 2006, Mr. Crossman's requests for information have oftentimes placed vast burdens on the resources of our office as well as other city departments. For this reason, the City Attorney informed Mr. Crossman that due to his unprecedented number of detailed requests, some requiring a voluminous amount of material to be examined and reviewed for protected information, our office deemed it necessary to limit the time spent responding to Mr. Crossman's requests to allow us to dutifully perform our other work. We advised our clients to do the same.

In the aforementioned letter and in subsequent correspondence with Mr. Crossman to which the Task Force was made aware, the City Attorney's Office also made clear that before devoting significant resources to a new request made by Mr. Crossman, we would complete our responses to his outstanding requests. We have advised our clients to do the same. When setting forth this process to best handle Mr. Crossman's requests, while reasonably attempting to protect City resources, we realized that this would result in missed deadlines. In this case we received a number of requests from Mr. Crossman during a relatively short time frame and since then we have also had to expend considerable resources responding to his complaints before the Task Force, at least one petition to the Supervisor of Records, and providing advice to client departments pertaining to his requests of them.

The City Attorney's Office takes very seriously its obligations under the Sunshine Ordinance and other public information laws. At the same time we owe a duty to the more than 750,000 other residents of this City to fulfill all of our duties, which include responding to other individual requests for public records. In the past two years, we believe that we have made progress in trying to fulfill Mr. Crossman's requests in a timely manner without compromising our services to every other San Franciscan. It is my hope that the Task Force recognizes the judiciousness with which we have sought to balance our competing obligations.

Very truly yours,


Alexis Thompson
Deputy Press Secretary

CITY AND COUNTY OF SAN FRANCISCO



DENNIS J. HERRERA
City Attorney

OFFICE OF THE CITY ATTORNEY

MATT DORSEY
Public Information Officer

January 12, 2006

Mr. Kimo Crossman
Transmitted via email and U.S. Postal Service

Dear Mr. Crossman:

Over the past several months, you have made more than 50 public records requests to a number of City departments, including the Department of Telecommunications and Information Systems (DTIS), the San Francisco Public Utilities Commission (SFPUC) and this office. Beginning with documents relating to the wireless broadband component of the TechConnect initiative, your requests have subsequently expanded in scope, complexity and frequency to include, most recently, documents related to every public records request received by the City Attorney's Office over the last two years.

Many of your requests include numerous subparts—in some cases, as many as eleven—which, together with related questions, easily push your total number of discrete requests into the hundreds. As you know, almost all of your requests are styled as "immediate disclosure requests," demanding a response by the close of business the following day, placing immediate and inescapable burdens on City employees, and hampering the ability of the departments to perform their functions. More recently you have quarreled with the specific format of electronic documentation the City has already provided you. You have insisted on the provision of electronic "metadata" from emails and other documents requiring technical expertise far beyond that of most standard office program end-users (myself included) and that may implicate attorney work-product privileges or other prohibitions against disclosure. You make insufficiently specific references to questions buried in email chains so lengthy and heavily annotated as to be virtually incomprehensible.

By now you are well aware that your requests have placed enormous burdens on the resources of this office as well as other city departments. We have responded to your requests diligently and courteously, and have devoted as many resources as could be made available to the tasks your requests have required: analysis of increasingly complex requests; consultation with persons who could assist in providing responses; searching for potentially responsive records; reviewing records when located; preparing written responses to your requests; and disseminating responsive records. In some instances, this office and our client departments have been able to provide a complete response within a single business day. In other instances, we have found it necessary to invoke a 14-day extension permitted under certain circumstances.

Letter to Mr. Kimo Crossman

Page 2

January 12, 2006

I must assume you are also aware that careful scrutiny and attention are required when locating and releasing public records, particularly where they involve legal matters and personal correspondence from citizens. No less serious than our legal obligation to release public information when requested is our legal obligation to avoid disclosing attorney-client privileged communications or personal (in many cases constitutionally-protected) information conveyed by private individuals communicating with the City.

The right to privacy is explicit in the California Constitution, and we take our duty to protect the privacy rights of individuals as seriously as our duties under the City's Sunshine Ordinance. To respond to your requests, it is sometimes necessary to review each page of otherwise responsive records, many of which consist of lengthy e-mail chains. A single example—which is representative of many of your requests—is your November 8, 2005 request for over three months of communications relating to the wireless broadband project. The responsive material included hundreds of emails from private persons as well as follow-up emails that refer to and incorporate those communications. Accordingly, it was necessary to carefully examine and painstakingly redact each printed page by hand in order to prevent public disclosure of such private information as home addresses and telephone numbers.

To date, we estimate that DTIS, SFPUC and this office have provided documents in response to your requests numbering in the thousands of pages. We additionally expect that your pending requests will add still more thousands to that total. Moreover, we conservatively estimate that the time devoted to fulfilling your requests by deputy city attorneys alone (not including time devoted to the task by departmental and non-legal staff) is more than 500 hours, **at a cost to taxpayers of over \$100,000**. You are well aware, of course, that our Sunshine Ordinance contains no provision to allow us to recover any of these expenses beyond a 10-cent per page charge if paper copies are made.

We take our obligations under the Sunshine Ordinance and other public records laws very seriously. But we also owe a duty to the more than 750,000 other residents of this City to carry out all of the governmental functions of our respective departments—including responding to their specific requests for public records. We do not believe that the voters who adopted the Sunshine Ordinance intended to enable one person or group to unreasonably commandeer such a significant share of City resources, for such an extended period, with no end in sight. Further, we do not believe that the voters intended the immediate disclosure request process to be used in the manner you have employed: as a routine, sometimes daily, process for a single requester or group to inundate the City with public record requests that in substance are indistinguishable from requests subject to the 10-day response period under the Public Records Act. Indeed, in the staggering and unprecedented scope of your most recent requests, you have abandoned any pretense of topical specificity, displayed troubling instances of hostility toward individual City employees, and made increasingly outrageous demands on City departments that would effectively shut those departments down to respond to all your requests.

Letter to Mr. Kimo Crossman

Page 3

January 12, 2006

Mindful of our obligations to all the residents of San Francisco and the considerable time and resources we have already devoted to responding to your requests, this letter serves to notify you that the City Attorney has advised our client departments that they may limit the time they spend responding to your public records requests to a reasonable amount of time that permits them to perform their other duties. This office similarly intends to limit the time we spend responding to your public records requests as necessary to allow us to perform our other work.

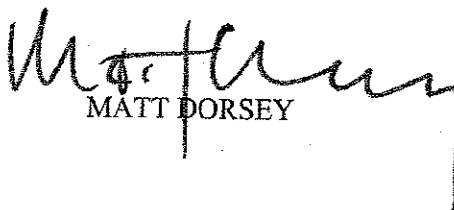
We will also advise our client departments that, before they devote significant resources to responding to your new requests, they should complete their responses to your outstanding requests. Our office will follow the same procedure. Given the volume, scope and frequency of your requests, which show no signs of abating, this reasonable allocation of resources will inevitably result in missed deadlines. If you wish our client departments or our office to focus on a new request, then you should inform us that you wish us to suspend work on prior requests in order to address the new one.

I finally wish to express that we take these steps reluctantly and only after ten weeks of unrelenting and burdensome requests. In recent years, this office has been widely praised for its commitment to Sunshine and open government. Indeed, the current City Attorney broke longstanding tradition in making legal opinions available online. He began publication of an annual Good Government Guide, and dramatically expanded Sunshine training for city officials. He ended the practice of representing department heads in hearings before the Sunshine Ordinance Task Force. And he insisted that the public information office he hired me to lead continues to earn its reputation as one of City government's most accessible and responsive to the news media and public it serves.

As an office deeply committed to open government and public scrutiny—including transparency in the City's contracting process—we are profoundly saddened that what appears to be a vexatious abuse of the San Francisco Sunshine Ordinance has forced the assertion of a limiting principle; in this case, the doctrine of implied rule of reason, well established in California case law, which sets reasonable limits for responding to public records requests.

We invite reasonableness in your future public records requests to enable us to complete our responses to those already outstanding. Further, we hope you will consider withdrawing or narrowing some of your prior public records requests to facilitate the City's ability to respond to your core requests, and we welcome your guidance in identifying priorities among your multiple requests already queued for response.

Sincerely,


MATT DORSEY

Letter to Mr. Kimo Crossman

Page 4

January 12, 2006

cc:

- Mayor Gavin Newsom
- Board of Supervisors President Aaron Peskin
- Sup. Michela Alioto-Pier
- Sup. Tom Ammiano
- Sup. Chris Daly
- Sup. Bevan Dufty
- Sup. Sean Elsbernd
- Sup. Fiona Ma
- Sup. Sophie Maxwell
- Sup. Jake McGoldrick
- Sup. Ross Mirkarimi
- Sup. Gerardo Sandoval

- SFPUC General Manager Susan Leal
- DTIS Acting Executive Director Chris Vein

- Sunshine Ordinance Task Force Chair Doug Comstock
- Sunshine Ordinance Task Force Vice Chair Erica Craven
- Sunshine Ordinance Task Force Member Sue Cauthen
- Sunshine Ordinance Task Force Member Richard Knee
- Sunshine Ordinance Task Force Member Nick Mueller
- Sunshine Ordinance Task Force Member David Pilpel
- Sunshine Ordinance Task Force Member Heather Sterner
- Sunshine Ordinance Task Force Member Marjorie Ann Williams
- Sunshine Ordinance Task Force Member Bruce Wolfe
- Sunshine Ordinance Task Force Member (Ex-officio) Gloria Young

FAX: (415) 554-7854

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http://www.sfgov.org/site/sunshine_form.asp?id=34307



Jon Lau/BOS/SFGOV

09/12/2007 02:59 PM

To Frank Darby/BOS/SFGOV@SFGOV

cc

Subject Fw: sunshine task force

thanks, frank. and one related request for you: can you please submit something written that explains the request of the committee. that would be helpful to us in developing our response.

cheers,
jon

Jonathan O. Lau
Legislative Assistant,
Office of Supervisor Sophie Maxwell
City Hall
1 Dr. Carlton B. Goodlett Place, Room 244
San Francisco, CA 94102-4689

e.mail: jon.lau@sfgov.org
ph: 415-554-7672
fax: 415-554-7674



Jon
Lau/BOS/SFGOV@SFGOV
09/13/2007 05:55 PM

To Paul Zarefsky/CTYATT@CTYATT
cc
bcc
Subject sunshine ordinance issues/procedures

paul:

thanks for your call-back. i'm actually going to be out of the office tomorrow (friday), so we'll follow-up next week.

cheers,
jon

Jonathan O. Lau
Legislative Assistant,
Office of Supervisor Sophie Maxwell
City Hall
1 Dr. Carlton B. Goodlett Place, Room 244
San Francisco, CA 94102-4689

e.mail: jon.lau@sfgov.org
ph: 415-554-7672
fax: 415-554-7674

David
Noyola/BOS/SFGOV@SFGO
V

09/17/2007 11:02 AM

To Paul Zarefsky/CTYATT@CTYATT

cc

bcc

Subject Fw: DCA Jurisdictional: #07057_Jeff Ente v. Supervisor
Aaron Peskin

David Noyola
Office of Supervisor Aaron Peskin
City Hall, Room 256
San Francisco, CA 94102
t. 415.554.7451
f. 415.554.7454


— Forwarded by David Noyola/BOS/SFGOV on 09/17/2007 11:07 AM —

SOTF/SOTF/SFGOV

08/03/2007 06:29 PM

To Aaron Peskin/BOS/SFGOV@SFGOV, David
Noyola/BOS/SFGOV@SFGOV, jeffente@att.net

cc

Subject DCA Jurisdictional: #07057_Jeff Ente v. Supervisor Aaron
Peskin 

Attached is a copy of the Deputy City Attorney's Jurisdictional Letter to the Complaint
Committee. This complaint will be heard by the committee on:

Date: Tuesday, August 14, 2007
Location: City Hall, Room 406
Time: 4:00 P.M.

Any support documents to be considered by committee members, prior to the meeting, must be
submitted by 4:00 PM Tuesday, August 7, 2007.



07057_DCA Jurisdictional.pdf

Sunshine Ordinance Task Force
1 Dr. Carlton B. Goodlett Place
City Hall, Room 244
San Francisco, CA 94102-4689
SOTF@SFGov.org
OFC: (415) 554-7724
FAX: (415) 554-7854

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http://www.sfgov.org/site/sunshine_form.asp?id=34307



Jon
Lau/BOS/SFGOV@SFGOV
09/20/2007 03:37 PM

To Paul Zarefsky/CTYATT@CTYATT
cc
bcc
Subject Fw: sunshine task force

paul:

fyi, below is a note from the Sunshine Task Force regarding the matter we've been playing phone tag about. let's follow-up when you have a chance.

thanks,
jon

Jonathan O. Lau
Legislative Assistant,
Office of Supervisor Sophie Maxwell
City Hall
1 Dr. Carlton B. Goodlett Place, Room 244
San Francisco, CA 94102-4689

e.mail: jon.lau@sfgov.org
ph: 415-554-7672
fax: 415-554-7674

----- Forwarded by Jon Lau/BOS/SFGOV on 09/20/2007 03:37 PM -----



SOTF/SOTF/SFGOV
09/20/2007 02:11 PM

To Jon Lau/BOS/SFGOV@SFGOV
cc
Subject Fw: sunshine task force

Hi Jon,

The Task Force is interested in knowing what is being done to ensure fairness, transparency and orderly administration of public comment, with regards to the handling of speaker cards during public comment at the Land Use and Economic Development Committee meetings. Their interest is based on allegations presented to them in two complaints that speakers have been called out of order during public comment.

The Task Force urged Supervisor Maxwell to adopt clear policies and regulations to provide for a transparent and orderly administration of public comment.

Frank Darby, Administrator
Sunshine Ordinance Task Force
1 Dr. Carlton B. Goodlett Place
City Hall, Room 244
San Francisco, CA 94102-4689
SOTF@SFGov.org
OFC: (415) 554-7724

Paul Zarefsky/CTYATT
09/27/2007 03:47 PM

To Jon Lau/BOS/SFGOV@SFGOV
cc Cheryl Adams/CTYATT@CTYATT
bcc
Subject Re: two upcoming items

Sorry, Jon, I've been swamped on things. My suggestion would be that we meet (or talk on the phone) sometime tomorrow on the speaker cards issue. What would work for you?

Deputy City Attorney Paul Zarefsky
City and County of San Francisco
Room 234, City Hall - 1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102-4682
Phone: (415) 554-4652 Fax: (415) 554-4747
E-mail: paul.zarefsky@sfgov.org
Jon Lau/BOS/SFGOV@SFGOV



Jon
Lau/BOS/SFGOV@SFGOV
09/27/2007 03:38 PM

To Paul Zarefsky/CTYATT@CTYATT
cc Cheryl Adams/CTYATT@CTYATT
Subject two upcoming items

hey, paul:



also, the next committee of the sunshine task force is Oct.10. we'd love to have some response crafted for them by that time regarding the "speaker card handling procedures" issue that i mentioned.

thanks a lot,
jon

Jonathan O. Lau
Legislative Assistant,
Office of Supervisor Sophie Maxwell
City Hall
1 Dr. Carlton B. Goodlett Place, Room 244
San Francisco, CA 94102-4689

e.mail: jon.lau@sfgov.org
ph: 415-554-7672
fax: 415-554-7674

Paul Zarefsky/CTYATT

10/09/2007 05:39 PM

To Jon Lau/BOS/SFGOV@SFGOV

cc

bcc

Subject follow-up

Jon, I didn't hear back from you re the public comment/speaker card issue. Why don't you give me a call. My understanding is that it's before the Compliance and Amendments Committee tomorrow. Try my office phone first but if necessary call my cell 378-9607. Thanks.

Deputy City Attorney Paul Zarefsky
City and County of San Francisco
Room 234, City Hall - 1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102-4682
Phone: (415) 554-4652 Fax: (415) 554-4747
E-mail: paul.zarefsky@sfgov.org