

Date: July 12, 2011

Item No. 5
File No. 11013

SUNSHINE ORDINANCE TASK FORCE

Compliance and Amendments Committee

AGENDA PACKET CONTENTS LIST*

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| <input checked="" type="checkbox"/> | Patrick Monette-Shaw v Controller, Ethics Commission |
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Completed by: Chris Rustom

Date: July 8, 2011

***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**



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ORDER OF DETERMINATION

June 14, 2011

DATE THE DECISION ISSUED

April 26, 2011

*PATRICK MONETT-SHAW V CONTROLLER'S OFFICE AND ETHICS COMMISSION
(CASE NO. 11013)*

FACTS OF THE CASE

Complainant Patrick Monette-Shaw alleges that the San Francisco Controller and the Ethics Commission violated the Ordinance by failing to provide records in response to his Immediate Disclosure Requests ("IDRs") for any and all written correspondence between the City Controller's Office and the Ethics Commission related to the Whistleblower Complaint filed by Dr. Derek Kerr and Dr. Maria Rivero regarding the Laguna Honda Hospital Patient Gift fund between the period of February 1, 2010, and December 31, 2010.

COMPLAINT FILED

On March 6, 2011, Mr. Monette-Shaw filed a complaint with the Task Force alleging that the departments violated Sections 67.24, 67.26, and 67.34 of the Ordinance.

HEARING ON THE COMPLAINT

On April 26, 2011, Mr. Monette-Shaw presented his case to the Task Force. The Controller's Office was represented by Tonia Lediju and Richard Mo represented the Ethics Commission.

Mr. Monette-Shaw said DCA Jerry Threet's Instructional letter to the Task Force states that the central issue is whether state law requires the disclosure of the records. He said DCA Threet also said that the California Public Records Act ("CPRA") makes most government documents public. He said Sunshine Ordinance Section 67.24(h) prohibits asserting exemptions for withholding documents based on the "deliberative process" exemption. He said the official information privilege faces two tests. The first is if the disclosure is forbidden by federal or state law and the second is to see if confidentiality outweighs the need for public disclosure. In both instances, he said, the Ethics Commission and the Controller's Office have not provided sufficient rationale. Sunshine Ordinance Section 67.24(i) eliminates the balancing test as an exemption, he said, adding that Evidence Code 1040 was not an available exemption for Ethics Commission and the Controller's Office because the documents are not "official information."

He added that Charter Section C3.699-13 does not apply to this case because it is directed only at finance, lobbying and conflict of interest cases. And, he said, the word whistleblower does not appear in the section. He said although Ms. Lediju has asserted that California Government Code Section 53087.6 applied because investigative audits are exempt from disclosure, his request was not for investigative audits but specifically for copies of correspondence between the Ethics Commission and the Controller's Office. Sec. 53087.6 provides for the identity of whistleblowers to be kept confidential and that can be accomplished through redaction rather than withholding, he said.

Ms. Lediju said the Controller's Office properly released its audit report and also properly kept any other documents confidential. She said that the San Francisco Charter provides that all records related to a whistleblower complaint are to be kept confidential. She said the Controller's Office also keeps whistleblowers investigations confidential under requirements of state law which allows disclosure only in limited circumstances. She said while whistleblowers may consent to have their identities revealed, they do not have the authority to release other information involved in the investigation. To do that, she said, may cause potential complainants not to come forward. She said besides rules and manuals that have to be followed when handling whistleblower cases, there is also an oversight committee that monitors the program. She added that the Controller's Office also does benchmarking with other entities across the United States at the state and local levels.

Mr. Moe said Charter Section C3.699 13-a provides that records of any whistleblower investigation by Ethics shall be considered confidential to the extent permitted by state law. He said DCA Threet's letter provides a roadmap as to why the Charter provision prevails over Sunshine in this case.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Judging from the evidence presented, the Task Force finds that the Controller's Office failed to respond to the IDR as required by the Sunshine Ordinance. Based on their conclusion that the CPRA trumps conflicting provisions of the Charter, the Task Force said the correspondence about who has or is handling the investigation must be released.

DECISION AND ORDER OF DETERMINATION

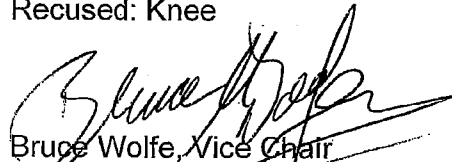
The Task Force first found that the Controller's Office violated Sunshine Ordinance Section 67.25 for untimely response to the IDR. In a separate motion, the Task Force also found the Ethics Commission and the Controller's Office in violation of Section 67.26 for not keeping withholding to a minimum and Section 67.27 for failure to justify the withholding. The departments shall release the records requested within 5 business days of the issuance of this Order and appear before the Compliance and Amendments Committee on July 12, 2011.

This Order of Determination was adopted by the Sunshine Ordinance Task Force on April 26, 2011, by the following vote:

Ayes: Manneh, Washburn, Costa, Chan, Johnson, West, Cauthen, Wolfe

Excused: Knoebber

Recused: Knee



Bruce Wolfe, Vice Chair
Sunshine Ordinance Task Force

c: Patrick Monett-Shaw, Complainant
Tonia Lediju, Respondent
Richard Moe, Respondent
Jerry Threet, Deputy City Attorney



CITY AND COUNTY OF SAN FRANCISCO
OFFICE OF THE CONTROLLER

Ben Rosenfield
Controller
Monique Zmuda
Deputy Controller

Compliance and Amendments Committee
Sunshine Ordinance Task Force
c/o Chris Rustom, Office of the Clerk
San Francisco Board of Supervisors
1 Dr. Carlton B. Goodlett Place, Room 244
San Francisco, CA 94102-4689

Re: Complaint #11013 Patrick Monette-Shaw. vs. Controller's Office, Ethics Commission

Dear Members of the Compliance and Amendments Committee:

The complainant made a public records request for copies of written correspondence between the Controller's Office and the Ethics Commission regarding a Whistleblower complaint filed by Drs. Derek Kerr and Maria Rivero regarding the Laguna Honda Hospital Patient Gift Fund ("Laguna Honda Patient Gift Fund") between the period of February 1 and December 31, 2010.

Task Force Hearing and Determination

The Task Force held a hearing on the complaint on April 26, 2011. On June 14, 2011, the Task Force issued an Order of Determination, finding that the Controller's Office violated the following provisions of the Sunshine Ordinance: Sections 67.25 (untimely response to an immediate disclosure request), 67.26 (not keeping withholding to a minimum), and 67.27 (failure to justify withholding). The Task Force order directed the Controller to release the records requested by the complainant and to appear before this Committee on July 12, 2011.

The Controller Properly Denied the Requested Records Based on the San Francisco Charter and State Law

The Controller's Office provided the Task Force with the legal authority under the San Francisco Charter and State law that protects from disclosure records of Whistleblower investigations. *See* San Francisco Charter §F1.110(b); California Government Code §53087.5; California Evidence Code §1040; and the right to privacy under California Constitutions Article 1, §1 and California Government Code §6254(c).

The Findings of Fact and Conclusions of Law adopted by the Task Force do not address these laws, but simply state as follows: "Based on their conclusion that the CPRA [California Public Records Act] trumps conflicting provisions of the Charter, the Task Force said the correspondence about who has or is handling the investigation must be released."

The Controller's Office respectfully disagrees with the Task Force. For the reasons that we explained fully in our letter to the Task Force before the hearing, as well as during the hearing itself, protecting the confidentiality of records of investigation is vital to an effective Whistleblower program. This policy is supported by the state laws cited, including California Government Code Section 53087.5, which regulates local Whistleblower programs.

In light of the extensive hearing conducted before the Task Force in this matter, and our differing views on the governing law, the Controller's Office submits this response to the Order of Determination issued by the Task Force in lieu of attending the Compliance and Amendments Committee hearing.

Respectfully,

A handwritten signature in black ink, appearing to read 'Tonia Lediju', with a stylized flourish at the end.

Tonia Lediju
Director of Audits



pmonette-shaw
<Pmonette-shaw@earthlink.net>

07/04/2011 05:53 PM

Please respond to
Pmonette-shaw@earthlink.net

To sotf@sfgov.org

cc Tonia.Lediju@sfgov.org, Monique.Zmuda@sfgov.org,
john.st.croix@sfgov.org, Steven.Massey@SFGOV.ORG,
Garrett.Chatfield@SFGOV.ORG

bcc

Subject Re: Document Received: #11013_Patrick Monette-Shaw vs
Controller's Office, Ethics Commission

July 4, 2011

Chris Rustom
Sunshine Ordinance Task Force
1 Dr. Carlton B. Goodlett Place
City Hall, Room 244
San Francisco, CA 94102-4689

Dear Mr. Rustom,

Considering that Mr. St. Croix and Ms. Lediju now appear to be refusing to comply with the Sunshine Task Force's Order of Determination regarding complaint #11013, I now ask that the Compliance Committee recommend to the full Task Force a new violation of Sunshine Ordinance Section 67.34, Willful Failure Shall Be Official Misconduct.

I remind the Task Force that Section 67.34 specifically states that willful failure of "department heads or other managerial city employees" to discharge their duties imposed by the Sunshine Ordinance shall be deemed official misconduct. It is my belief that Ms. Lediju is a "managerial city employees" and Mr. St. Croix is a department head.

Patrick Monette-Shaw

sotf@sfgov.org wrote: