

Date: July 12, 2011

Item No. 6

File No. 11014

SUNSHINE ORDINANCE TASK FORCE

Compliance and Amendments Committee

AGENDA PACKET CONTENTS LIST*

- Patrick Monette-Shaw v Ethics Commission**
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Completed by: Chris Rustom

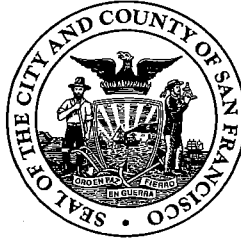
Date: July 8, 2011

***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 7, 2011

DATE THE DECISION ISSUED

May 18, 2011

PATRICK MONETTE-SHAW V ETHICS COMMISSION (CASE NO. 11014)

FACTS OF THE CASE

Complainant Patrick Monette-Shaw alleges that the San Francisco Ethics Commission ("Ethics Commission" or "Ethics") violated the Ordinance by failing to provide records in response to his February 6, 2011, Immediate Disclosure Request ("IDR") for the following:

- The Ethics Commission investigative file(s) regarding the Laguna Honda Hospital patient gift fund complaint.
- Any closing memo(s) authored by Ethics Commission staff regarding the patient gift fund complaint.

COMPLAINT FILED

On March 6, 2011, Complainant filed a complaint with the Task Force alleging a violation of Sunshine Ordinance Sections 67.24, 67.26 and 67.34.

HEARING ON THE COMPLAINT

On May 18, 2011, Mr. Monette-Shaw presented his case to the Task Force. Garrett Chatfield represented the Ethics Commission.

Mr. Monette-Shaw argued that California Government Code Section 6254(f) permits withholding of investigation files only for state or local agencies that have correctional law enforcement or licensing requirements, which Ethics does not have. Ethics, he said, is just another agency as far as CPRA is concerned and San Francisco Charter Appendix C3.699-13 applies only to Ethics laws and not to public records access laws.

Mr. Monette-Shaw further argued that:

- Sunshine Ordinance Section 67.24(g) states City agencies and officials may not assert CPRA Section 6255 or any similar provision as the basis for withholding.
- Sunshine Ordinance Section 67.24(h) prohibits the use of "deliberative process" exemption of CPRA as an exception for withholding.
- Sunshine Ordinance Section 67.24(i) prohibits claiming exemption for withholding based on whether the public interest in withholding outweighs the public interest in disclosure.

He further argued that invocation of the "interest of justice" exemption has been ruled by the

California Supreme Court to be the same as the public interest balancing test, which is prohibited by the Sunshine Ordinance. He said Section 67.24(i) eliminates that test as an exemption. Therefore, he argued, Evidence Code 1040 does not provide a basis for withholding. And since CPRA does not exempt Ethics investigations, whatever Ethics claims is in the Charter is moot and should be ruled irrelevant by the Task Force.

Mr. Chatfield, an investigator with the Ethics Commission, told the Task Force that Mr. Monette-Shaw requested investigative files regarding a complaint and any closing memo authored by Ethics regarding the complaint. Under the San Francisco City Charter, he said, Ethics must conduct its investigation in a confidential manner. He said the Charter says the records of any investigation shall be considered confidential to the extent permitted by state law. Mr. Chatfield said the Charter also says records means all documents gathered by and generated by Ethics in the course of the investigation.

Mr. Chatfield further argued that the Charter preempts local ordinances and must therefore take precedence over the Sunshine Ordinance regarding the disclosure of public records. CPRA Sections 6276 and 6276.32, he said, provide that the documents that constitute official information are exempt from disclosure as public records. Here, the CPRA refers to Evidence Code 1040, which defines as subject to withholding "official information" that was acquired in confidence by a public employee in the course of his or her duty, where the information was not disclosed to the public prior to the time the claim of privilege is made. Mr. Chatfield said that with the exception of Task Force referrals, complaints received by Ethics are official information. He said they are gathered in confidence by members of the public or employees and have not been disclosed to the public prior to our gathering of information.

Mr. Chatfield argued that this exemption applies to all of Ethics' investigations and not only to whistleblower complaints. Mr. Chatfield said the disclosure of an investigation record is against the public's interest because there is a strong interest in encouraging employees and members of the public to come forward with complaints of violations of law within our jurisdiction. If Ethics cannot protect the identity or information provided by complainants, they are less likely to come forward, he said.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In refusing to release the requested information, the Ethics Commission relied on the "official information" exemption codified in California Evidence Code Section 1040. That provision of the California Evidence Code requires, at Section 1040(b), that agencies apply a balancing test to determine if disclosure of the information would be against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure. However, Ethics testified that it does not apply the required public-interest balancing test on a case-by-case basis. As a result, it must be the case that Ethics did not apply the required balancing test in the instance of the records sought by Mr. Monette-Shaw. It is therefore not entitled to withhold information based on that exemption and, lacking any other valid exemption under law, must produce records—redacted if necessary—in response to Mr. Monette-Shaw's requests. .

Based on the evidence presented, the Task Force finds that Ethics must release the information with any appropriate redactions and must keep withholding to a minimum.

DECISION AND ORDER OF DETERMINATION

The Task Force finds that the agency violated California Public Records Act Section 6253 *et seq.* and Sunshine Ordinance Section 67.26. The agency shall release the records requested within 5 business days of the issuance of this Order and shall appear before the Compliance and Amendments Committee on June 14, 2011.

This Order of Determination regarding the CPRA violation was adopted by the Sunshine Ordinance Task Force on May 18, 2011, by the following vote: (Snyder/Wolfe)

Ayes: Snyder, Manneh, Washburn, Wolfe, Johnson, Knee

Noes: None

Recused: Cauthen

Excused: Knoebber, Costa, Chan

Absent: West.

This Order of Determination regarding the Sunshine Ordinance violation was adopted by the Sunshine Ordinance Task Force on May 18, 2011, by the following vote:

(Johnson/Washburn)

Ayes: Manneh, Washburn, Wolfe, Johnson

Noes: Snyder, Knee

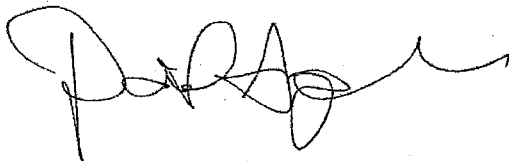
Recused: Cauthen

Excused: Knoebber, Costa, Chan

Absent: 1 - West.



Richard A. Knee, Chair
Sunshine Ordinance Task Force



David Snyder, Esq., Member, Seat #1*
Sunshine Ordinance Task Force

- c: Patrick Monette-Shaw, Complainant
- Garrett Chatfield, Respondent
- Jerry Threet, Deputy City Attorney

*Sunshine Ordinance Task Force Seat #1 is a voting seat held by an attorney specializing in sunshine law.



ETHICS COMMISSION CITY AND COUNTY OF SAN FRANCISCO

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CHARLES L. WARD
COMMISSIONER

JOHN ST. CROIX
EXECUTIVE DIRECTOR

Via Electronic Mail

Richard Knee, Chair
Sunshine Ordinance Task Force
1 Dr. Carlton G. Goodlett Place, Room 244
San Francisco, CA 94102

June 13, 2011

Dear Chairperson Knee:

On May 18, 2011, the Sunshine Ordinance Task Force heard case number 11014, *Patrick-Monette-Shaw v. Ethics Commission*. The complaint alleged that the Ethics Commission violated the Sunshine Ordinance by failing to provide records in response to Mr. Monette-Shaw's February 6, 2011, Immediate Disclosure Request for the Ethics Commission's investigative files regarding the Laguna Honda Hospital patient gift fund and any closing memo authored by Ethics Commission staff regarding the patient gift fund complaint. At that hearing, the Task Force made two separate motions: 1) finding that the Ethics Commission violated California Public Records Act section 6253 et. seq., (SOTF MP3 Audio at minute 00:59:45) and 2) finding that the Ethics Commission violated Sunshine Ordinance section 67.26 (SOTF MP3 Audio at minute 1:10:55).

On June 7, 2011, the Ethics Commission received a written Order of Determination reflecting the two motions made at the hearing on May 18, 2011. It also ordered the release of the records within 5 business days from the issuance of the order, and mandated the appearance of the Ethics Commission at the Compliance and Amendments Committee meeting to be held on June 14, 2011.

For the reasons stated below, the Ethics Commission objects to both motions made by the Task Force at the hearing held on May 18, 2011. Further, the Ethics Commission objects to the order to release the documents and the order to attend the Compliance and Amendments Committee meeting as those findings were not included in any motion voted on by the Task Force at the May 18 hearing.

a. The Order of Determination misstates the testimony that occurred at the hearing.

The motion finding a violation of California Public Records Act section 6253 et. seq. was made by Member Snyder. Member Snyder stated that the Ethics Commission may be entitled to withhold official information provided the appropriate balancing test under California Evidence Code section 1040 was applied. Member Snyder made the motion stating that it was apparent that the Ethics Commission had not applied the balancing test in this instance, and that it had instead relied on the general application that its investigations are considered official information. The written Order inaccurately states that "[e]thics testified that it does not apply the required public-interest balancing test on a case-by-case basis. As a result, it must be the

case that Ethics did not apply the required balancing test in the instance of the records sought by Mr. Monette-Shaw.”

During the hearing Mr. Chatfield clearly stated that regarding this case, the balancing test was applied at the time the information was received by the Ethics Commission. (SOTF MP3 Audio at minute 00:36:25.) After Member Snyder made his motion, Mr. Chatfield was not afforded the opportunity to correct the Task Force’s mistaken understanding that the balancing test had not been applied in this case. The Task Force only allowed public comment on the motion, and specifically excluded either the complainant or respondent from commenting on the motion. Given that the Order was based on the supposed non-application of this test, even though the Task Force was informed during the hearing that the balancing test was applied, the Ethics Commission objects to the finding of a violation of PRA section 6253 et. seq.

b. The motion finding a violation of Sunshine Ordinance section 67.26 violated the City Charter as it was not passed by a majority of the Task Force members.

At the hearing, the motion to find a violation of Sunshine Ordinance section 67.26 had four yes votes and two no votes. On April 26, 2011, the Task Force adopted a rule allowing the passage of any motion by a simple majority of the number of members present at a Task Force hearing. The Task Force adopted this rule change against the advice of its own Deputy City Attorney and against the advice of Member Snyder, the Task Force’s attorney member. The rule change violates the City Charter. As only four members of the eleven-member Task Force voted affirmatively, the motion on May 18 regarding this violation failed.

Article IV of the City Charter governs the conduct of city boards and commissions established as part of the Executive Branch, and Charter provision 4.101 sets forth the composition of boards and commissions established by the Charter, legislative act of the United States, the State of California, and *the Board of Supervisors*. (Emphasis added.) Section 4.104(b) of the Charter clearly states that “[u]nless otherwise required by this Charter, the affirmative vote of a majority of the members shall be required for the approval of any matter, except that the rules and regulations of the body may provide that, with respect to matters of procedure the body may act by the affirmative vote of a majority of the members present, so long as the members present constitute a quorum. All appointive boards, commissions or other units of government shall act by a majority, two-thirds, three-fourths or other vote of *all* members.” (Emphasis added.)

In addition, the Brown Act, which is incorporated by Sunshine Ordinance section 67.5, defines an “action taken” as a “collective decision made by a majority of the members of a legislative body, a collective commitment or promise by a majority of the members of a legislative body to make a positive or a negative decision, or an actual vote by a majority of the members of a legislative body when sitting as a body or entity, upon a motion, proposal, resolution, order or ordinance.” (Cal. Govt. Code § 54952.6.) Sunshine Ordinance section 67.5 states that all meetings of any policy body are governed by the Brown Act.

In adopting its rule on April 26, 2011, the Task Force determined that Article IV of the Charter did not apply to the Task Force because it is a body established by the voters as part of the Board of Supervisors; thus, it is part of the Legislative branch. Although Article IV primarily deals with the Executive Branch, section 4.101 incorporates all boards and commission regardless of what body of government established the entity. Even if the Task Force is correct by excluding itself from the provisions in Article IV, Article II of the Charter sets out the same requirement for the Legislative branch. The Board of Supervisors *itself* is subject to the same quorum requirements to pass a motion as every other City board or commission. (See Charter Art. II, § 2.104 [Board of Supervisors shall act by a majority, two-thirds, three-fourths, or other vote of *all* members of the Board].)

The Task Force is an appointed board, and under Sunshine Ordinance section 67.30(c) one of its duties is to make referrals to a municipal office with enforcement power whenever it concludes that any person has violated a provision of the Sunshine Ordinance. Concluding whether or not a violation of the Sunshine Ordinance occurred is not a procedural act. The Task Force must have a majority of the total number of members voting affirmatively on a motion to find a violation of the Sunshine Ordinance in order for the motion to carry.

Contrary to the Charter provisions for both the Executive and Legislative branches, and contrary to the Brown Act, the Task Force has determined that it can pass a substantive vote by a simple majority of the members present. As this rule is unsupported by any Charter provision, the Ethics Commission objects to the finding that it violated Sunshine Ordinance section 67.26.

c. No motion was taken at the hearing to compel the production of the records or attendance at the Compliance and Amendments Committee meeting.

The Ethics Commission maintains its position that the City Charter requires that all Ethics Commission investigations remain confidential pursuant to State law, and the unauthorized disclosure of confidential information by any employee of the Ethics Commission is grounds for termination of that employee. (SF Charter, Appendix C, § C3.699-13(a).) The California Public Records Acts allows for withholding based upon the official information privilege. The required balancing test occurred in this case. Moreover, the written order to release the documents was not included in either motion at the May 18 hearing, nor was it separately voted on by the Task Force at that hearing. Thus, the Ethics Commission will not release the requested records.

During the hearing on May 18, one member of the Task Force indicated that the Ethics Commission should consider following the California Fair Political Practices Commission and publicly disclose a list of all current investigations. In an article by the Sacramento Bee on May 24, 2011, the FPPC Chairwoman, Ann Ravel was quoted stating that she was reversing the decision to post open investigations online.

Finally, as no motion was made at the hearing to require the Ethics Commission's attendance at the Compliance and Amendments Committee meeting, no representative from the Ethics Commission is *required* to attend the Committee meeting on June 14, 2011.

Sincerely,

John St. Croix
Executive Director



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

07/04/2011 05:48 PM

Please respond to
Pmonette-shaw@earthlink.net

To sof@sfgov.org
cc
bcc
Subject Moneete-Shaw Reply to Ethics Commission Response to Order of Determination (#11014_Patrick Monette-Shaw vs 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 appears to be refusing to comply with the Sunshine Task Force's Order of Determination regarding complaint #11014, 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.

Patrick Monette-Shaw