

Date: July 12, 2011

Item No. 8  
File No. 11016

**SUNSHINE ORDINANCE TASK FORCE**  
Compliance and Amendments Committee  
AGENDA PACKET CONTENTS LIST\*

- Andrew Sisneros against SFMTA**
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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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1 Dr. Carlton B. Goodlett Place, Room 244  
San Francisco 94102-4689  
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**ORDER OF DETERMINATION  
May 19, 2011**

**DATE THE DECISION ISSUED**  
May 5, 2011

*ANDREW SISNEROS V SF MUNICIPAL TRANSPORTATION AGENCY (CASE NO.  
11016)*

**FACTS OF THE CASE**

Complainant Andrew Sisneros alleges that the Municipal Transportation Agency ("MTA") failed to adequately respond to his February 9, 2011, public records request for "any and all documents related to the Drive Cam on Coach 8344 (including but not limited to reports, logs of maintenance records, and inspections) from the dates October 5, 2010, through November 30, 2010."

**COMPLAINT FILED**

On March 9, 2011, Mr. Sisneros filed a complaint against the MTA.

**HEARING ON THE COMPLAINT**

On May 5, 2011, Mr. Sisneros presented his case to the Task Force. The MTA was represented by Caroline Celaya and Ayn Antonio.

Mr. Sisneros, an MTA coach operator, told the Task Force that the MTA denied him access to a report on alleged tampering with a camera aboard a coach. He said his request was not related to an invasion of privacy and the attorney-client privilege did not apply. He said the MTA could have given him the report and redacted what was necessary. Moreover, he alleged the MTA, did not keep withholding to a minimum and failed to give him proper justification for withholding the document.

Ms. Celaya, an assistant to the MTA's Board secretary as well as the agency's public records request coordinator, said the MTA received the request on February 9, and that the MTA produced a copy of a photograph. She said the MTA did not provide a copy of an email chain and a six-minute clip from a driver cam because those were in the personnel files of MTA employees.

Ms. Celaya said Mr. Sisneros had access to his personnel file and has seen the email chain and the video. The video was not released because the agency did not know how to blur the faces in the video, she said. Ms. Celaya told the Task Force that staff was advised by the City Attorney's Office that the email was not redactable. Members questioned

Ms. Celaya as to why the faces in the video could not be blurred and why a video taken in a public bus and in a public setting, where one could not have any reasonable expectation of privacy, was subject to any privacy protection.

As to the tampering report sought by Mr. Sisneros, Ms. Antonio said she asked Paul Williamson, maintenance supervisor for Kirkland Division, to investigate. She said he told her there was no evidence of misuse.

Members questioned Ms. Antonio as to whether it is standard MTA practice to not create a written report under such circumstances. Ms. Antonio said that if Mr. Williamson had found something he would provide a written report, but as Task Force members were highlighting the need for a report for Mr. Sisneros to have, she would ask Mr. Williamson to create the document.

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based on the evidence presented, the Task Force finds that under Section 67.21(c) of the Sunshine Ordinance, the MTA should have told the requestor where to go to get documents such as logs and driver cam maintenance records. The Task Force further finds that the MTA violated Section 67.21(b) for failing to orally provide Mr. Sisneros the results of Mr. Williams' investigation into the report of tampering.

Finally, the task force finds that the MTA violated Section 67.26 for failing to release redacted versions of the documents questioned, because it was clear from MTA testimony that portions of the documents did not include information subject to withholding under the Sunshine Ordinance.

### DECISION AND ORDER OF DETERMINATION

The Task Force finds that the agency violated Sunshine Ordinance Sections 67.21(c) by not assisting the requestor gain access to the drive cam records, 67.22(b) by not providing oral information regarding the tampering report, and 67.26 by not keeping withholding to a minimum. The agency shall release the records requested within 5 business days of the issuance of this Order and appear before the Compliance and Amendments Committee on Tuesday June 14, 2011.

This Order of Determination was adopted by the Sunshine Ordinance Task Force on May 5, 2011, by the following vote: ( Wolfe / Knoebber )

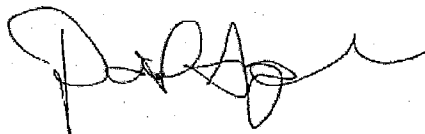
Ayes: Snyder, Cauthen, Manneh, Knoebber, Costa, Wolfe, Johnson, Knee

Absent: West

Excused: Washburn, Chan



Richard A. Knee, Chair  
Sunshine Ordinance Task Force



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

c: Andrew Sisneros, Complainant  
Caroline Celaya, Respondent  
Ayn Antonio, Respondent  
Jerry Threet, Deputy City Attorney

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

Edwin M. Lee | Mayor  
Tom Nolan | Chairman  
Jerry Lee | Vice-Chairman  
Leona Bridges | Director  
Cheryl Brinkman | Director  
Malcolm Heinicke | Director  
Bruce Oka | Director  
Joél Ramos | Director  
Nathaniel P. Ford Sr. | Executive Director/CEO

June 13, 2011

Honorable Members, Sunshine Ordinance Task Force Compliance  
and Amendments Committee  
c/o Chris Rustom, Administrator  
City Hall, Room 244  
1 Dr. Carlton B. Goodlett Place  
San Francisco, CA 94102

Re: Complaint of Andrew Sisneros against the San Francisco Municipal  
Transportation Agency  
Complaint No. 11016

Dear Compliance and Amendments Committee Members:

We write concerning a complaint filed by Mr. Andrew Sisneros with the Sunshine Ordinance Task Force ("SOTF") against the San Francisco Municipal Transportation Agency ("SFMTA") arising from his public records request dated February 9, 2011.

#### History

On February 9, 2011, Mr. Sisneros submitted a public records request for "any and all documents related to the Drive Cam on Coach 8344 (including but not limited to reports, logs of maintenance records, and inspections) from the dates October 5, 2010 through November 30, 2010."

In response to this request, the SFMTA provided Mr. Sisneros one non-privileged record. This record was a still DriveCam photograph which does not identify any individual SFMTA employee and not used in any SFMTA disciplinary proceeding. The SFMTA had no other non-privileged records such as DriveCam reports, maintenance record logs, or inspection records since the City's contractor – DriveCam – provides these services under an agreement with the SFMTA.

In addition, the SFMTA's response indicated that the agency was not producing certain documents where disclosure of such records would constitute an unwarranted invasion of personal privacy. The five documents withheld included four DriveCam videos which were used in the disciplinary proceedings against two individual SFMTA employees, and one document which was an email chain between several SFMTA employees who were investigating evidence of possible SFMTA employee tampering with DriveCam equipment on a transit vehicle. California Government Code §6254(c) and (k) (protecting records which are

"exempted or prohibited pursuant to provisions of federal or state law" from disclosure); *see also*, Cal. Const. Art. I §1. Further, the SFMTA indicated that since the records Mr. Sisneros sought were confidential personnel records, California courts have held that confidential personnel records are protected by the California Constitutional right of privacy. *See, Hill v. National Collegiate Athletic Assn.*, (1994) 7 Cal.4<sup>th</sup> 1, 35 (identifying privacy interest in precluding dissemination of sensitive, confidential information); *Teamsters Local 856 v. Priceless, LLC*, (2003) 112 Cal.App.4<sup>th</sup> 1500, 1512 (public employees have a right to privacy in their personnel files).<sup>1</sup>

Although Mr. Sisneros submitted a signed waiver which waived *his* privacy interests in these documents, the documents withheld by the SFMTA are also confidential personnel records for another SFMTA employee. As a result, the SFMTA declined to produce these records since Mr. Sisneros does not have the ability to waive the privacy interests of other SFMTA employees.

#### **Decision and Order of Determination**

On May 5, 2011, following a hearing, the SOTF announced a decision finding that the SFMTA violated Sunshine Ordinance Sections 67.21(c) by not assisting the requestor to gain access to DriveCam records, 67.21(b) by not providing oral information regarding the tampering report, and 67.26 by not keeping withholding to a minimum. This decision was reduced to writing in an order of determination dated May 19, 2011. The SFMTA disagrees with SOTF's decision and order of determination and declines to disclose any of the records previously withheld for the following reasons.

First, S.F. Administrative Code §67.21(c) provides that "(a) custodian of any public record, when not in possession of the record requested, shall assist a requester in directing a request to the proper office or staff person." This provision, however, does not require the SFMTA to produce records which are exempt from disclosure due to employee privacy. The SFMTA declined to produce five records in its possession which are personnel records for both Mr. Sisneros and another SFMTA employee due to privacy concerns. Although Mr. Sisneros signed a waiver releasing *his* privacy interests in these documents, he does not have the ability to waive the privacy interests of other SFMTA employees. And because these records, in their entirety, pertain to the other employee as well as to Mr. Sisneros, they cannot be redacted to protect the other employee's privacy. The SFMTA has no other responsive documents which have not already been provided to Mr. Sisneros. Further, there is no other City department which has any other responsive records. As result, there was no violation of Section 67.21(c) of the Sunshine Ordinance by the SFMTA.

Second, the SOTF found that the SFMTA violated Section 67.21(b) of the Sunshine Ordinance by failing to orally provide Mr. Sisneros the results of an internal investigation

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<sup>1</sup> We note that Mr. Sisneros was provided access to his own personnel file pursuant to Cal. Labor Code §1198.5 in response to a separate public records request submitted to the SFMTA on December 22, 2010.

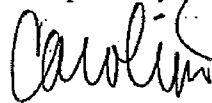
concerning the tampering with DriveCam equipment by SFMTA employees. No written report concerning the results of SFMTA's investigation existed. But S.F. Administrative Code §67.21(b) does not require the SFMTA to create a record that is not already in its possession. And the California Public Records Act only requires an agency to make available to any person a copy of an "identifiable record or records" in its possession, unless the record is specifically exempt from disclosure. (California Gov. Code §6253(b).) The City's obligation under the Sunshine Ordinance, similar to the California Public Records Act, is to produce public records in its custody, not to create records that do not exist. Further, even if this nonexistent record existed, it would be exempt from disclosure due to employee privacy.

We further note that Section 67.22 of the Sunshine Ordinance requires that each department have a designated contact person to answer questions pertaining to the department's "operations, plans, policies, and positions." (S.F. Admin. Code §67.22(a).) Section 67.22(b) indicates that the contact person be available to provide information to members of the public who are not requesting information from a specific person. (S.F. Admin. Code §67.22(b).) But, in this case, there has been no allegation that SFMTA does not have a designated public contact person. And the department's obligation to provide oral information to members of the public, which obligation is stated in the general terms of "operations, plans, policies, and positions," does not extend to results of specific personnel investigations; and certainly not in cases where, if the information were reduced to writing, it would be exempt from disclosure.

Third, S.F. Administrative Code §67.26 provides that "no record shall be withheld from disclosure in its entirety unless all information contained in it is exempt from disclosure under express provisions of the California Public Records Act or of some other statute." As previously noted, with respect to the documents withheld from disclosure, the documents are exempt from disclosure in their entirety due to employee privacy. Regarding the video records, these records were used in the disciplinary proceedings for *two* individual SFMTA employees. Further, the SFMTA has neither the technological ability to blur or redact any image contained on the video clip nor the obligation to obtain the technology to do so. Neither the California Public Records Act nor the Sunshine Ordinance require a department in possession of videotapes to purchase technology that would facilitate the blurring or redaction of videotaped images.

As a result, the SFMTA has concluded that the Sunshine Ordinance does not mandate disclosure of these documents under these circumstances. We hope this letter has been of assistance in clarifying the SFMTA's position with respect to these records.

Respectfully submitted,



Caroline Celaya