

Date: August 13, 2008

Item No. 6
File No. 08032

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: Frank Darby

Date: August 8, 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**



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ORDER OF DETERMINATION

August 4, 2008

DATE THE DECISION ISSUED

July 22, 2008

KIMO CROSSMAN v. CITY ATTORNEY'S OFFICE (08032)

FACTS OF THE CASE

On or about June 4, 2008, Kimo Crossman contacted Matt Dorsey, Public Information Officer for the City Attorney's Office ("CAO") and asked that the CAO provide Kimo Crossman with a "Word Version" of a record that he had in PDF format. The record is a September 25, 2007 letter to the Board of Supervisors and Ethics Commission from the Mayor, transmitting written charges of official misconduct "In the Matter of Charges Against Edmund Jew". Matt Dorsey responded and declined to provide the "Word Version". Matt Dorsey referred Kimo Crossman to the City Attorney's Office Website and to a particular letter that stated the CAO's position on the release of information in "Word Version".

COMPLAINT FILED

On June 6, 2008, Crossman filed a complaint with the Sunshine Ordinance Task Force ("Task Force"), alleging that the CAO violated Sections 67.21(L), 67.21-1, 67.26 and 67.27 of the Sunshine Ordinance and Sections 6253(b) and 6253.9 of the State Government Code by refusing to release the record in a "Word Version".

HEARING ON THE COMPLAINT

On July 22, 2008, Complainant Kimo Crossman appeared before the Task Force and presented his Complaint. Respondent was represented by Deputy City Attorney Paul Zarefsky who presented the Department's defense.

The issue in the case is whether the Department violated Section(s) 67.21, 67.21-1, 67.26 & 67.27 of the Ordinance and Sections 6253.9 & 6253 of the California Public Records Act.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case is similar in its facts and on the law to the previously decided case of Crossman v. Clerk of the Board of Supervisors in which a document was also requested to be released in Word Format. To be consistent with our earlier decision, and as the policy and legal justifications provided by the Department are not persuasive in light of the clear legal requirements of the Ordinance and Government Code, the following decision is issued.

ORDER OF DETERMINATION

DECISION AND ORDER OF DETERMINATION

The Task Force finds that the Department violated Section(s) 67.21 (1) of the Sunshine Ordinance and 6253.9 (a) (i) & (ii) of the California Public Records Act for failure to provide a copy of the requested document in Word format as requested. The Department shall release the record in Word format as requested within 5 business days of the issuance of this Order and appear before the Compliance and Amendments Committee on August 13, 2008.

This Order of Determination was adopted by the Sunshine Ordinance Task Force on July 22, 2009, by the following vote: (Knee / Goldman)

Ayes: Craven, Knee Washburn, Knoebber, Chu, Goldman

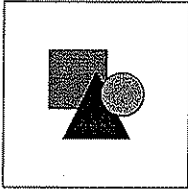
Noes: Pilpel

Excused: Cauthen, Gokhale, Chan, Williams



Kristin Murphy Chu, Chair
Sunshine Ordinance Task Force

c: Ernie Llorente, Deputy City Attorney
Kimo Crossman
Paul Zarefsky, Deputy City Attorney
City Attorney's Office



DENNIS J. HERRERA
City Attorney

ERNEST H. LLORENTE
Deputy City Attorney

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MEMORANDUM

July 14, 2008

KIMO CROSSMAN v. CITY ATTORNEY'S OFFICE (08032)

COMPLAINT

THE COMPLAINANT ALLEGES THE FOLLOWING FACTS:

On or about June 4, 2008, Kimo Crossman contacted Matt Dorsey, Public Information Officer for the City Attorney's Office ("CAO") and asked that the CAO provide Kimo Crossman with a "Word Version" of a record that he had in PDF format. The record is a September 25, 2007 letter to the Board of Supervisors and Ethics Commission from the Mayor, transmitting written charges of official misconduct "In the Matter of Charges Against Edmund Jew". Matt Dorsey responded and declined to provide the "Word Version". Matt Dorsey referred Kimo Crossman to the City Attorney's Office Website and to a particular letter that stated the CAO's position on the release of information in "Word Version".

COMPLAINANT FILES COMPLAINT

On June 6, 2008, Crossman filed a complaint with the Sunshine Ordinance Task Force ("Task Force"), alleging that the CAO violated Sections 67.21(L), 67.21-1, 67.26) and 67.27 of the Sunshine Ordinance and Sections 6253(b) and 6253.9 of the State Government Code by refusing to release the record in a "Word Version".

RESPONDENT REPLIES

Matt Dorsey in his reply to Kimo Crossman references a legal opinion by DCA Paul Zarefsky dated September 19, 2006 that was prepared in an earlier case of Crossman v. Gloria Young, Clerk of the Board of Supervisors. The issues of the earlier case are identical with the current case.

JURISDICTION

Based on the allegations of the complaint and the sections of the Ordinance stated below, the Task Force has jurisdiction to hear this matter. In addition the parties in this case do not contest jurisdiction.

Memorandum

APPLICABLE STATUTORY SECTIONS:

1. Sunshine Ordinance, San Francisco Administrative Code Section 67.21 addresses general requests for public documents including records in electronic format.
2. Sunshine Ordinance, San Francisco Administrative Code Section 67.21-1 addresses the policy regarding the use and purchase of computer systems.
3. Sunshine Ordinance, San Francisco Administrative Code Section. 67.26 deals with withholding kept to a minimum.
4. Sunshine Ordinance, San Francisco Administrative Code Section. 67.27 deals with justification for withholding.
5. California Public Records Act, Government Code Section 6253.9 deal with information in an electronic format.
6. California Public Records Act, Government Code Section 6253 deals with public records open to inspection; agency duties and time limits.

APPLICABLE CASE LAW:

none

ISSUES TO BE DETERMINED

1. FACTUAL ISSUES

A. Uncontested Facts:

The parties agree to the following facts:

- Crossman submitted a public records request to Matt Dorsey, Public Information Officer for the September 25, 2007 letter to the Board of Supervisors and Ethics Commission from the Mayor, transmitting written charges of official misconduct in MS Word format.
- Matt Dorsey declined to provide the document in MS Word format.

B. Contested facts/ Facts in dispute:

Memorandum

The Task Force must determine what facts are true.

i. Relevant facts in dispute:

Whether documents can be released in MS Word format without compromising the security or integrity of the original record?

2. QUESTIONS THAT MIGHT ASSIST IN DETERMINING FACTS:

a.) What is the significance of metadata?

3. LEGAL ISSUES/ LEGAL DETERMINATIONS:

- Were sections of the Sunshine Ordinance (Section 67.21), Brown Act, and/or Public Records Act were violated?
- Was there an exception to the Sunshine Ordinance, under State, Federal, or case law?

CONCLUSION

THE TASK FORCE FINDS THE FOLLOWING FACTS:

THE TASK FORCE FINDS THAT THE ALLEGED VIOLATIONS TO BE TRUE OR NOT TRUE.

Memorandum

ATTACHED STATUTORY SECTIONS FROM CHAPTER 67 OF THE SAN FRANCISCO ADMINISTRATIVE CODE (THE SUNSHINE ORDINANCE) UNLESS OTHERWISE SPECIFIED

Section 67.21 addresses general requests for public documents.

This section provides:

- a.) Every person having custody of any public record or public information, as defined herein, ... shall, at normal times and during normal and reasonable hours of operation, without unreasonable delay, and without requiring an appointment, permit the public record, or any segregable portion of a record, to be inspected and examined by any person and shall furnish one copy thereof upon payment of a reasonable copying charge, not to exceed the lesser of the actual cost or ten cents per page.
- b.) A custodian of a public record shall as soon as possible and within **ten days** (emphasis added) following receipt of a request for inspection or copy of a public record, comply with such request. Such request may be delivered to the office of the custodian by the requester orally or in writing by fax, postal delivery, or e-mail. If the custodian believes the record or information requested is not a public record or is exempt, the custodian shall justify withholding any record by demonstrating, in writing as soon as possible and within ten days following receipt of a request, that the record in question is exempt under express provisions of this ordinance.
- c.) A custodian of a public record shall assist a requester in identifying the existence, form, and nature of any records or information maintained by, available to, or in the custody of the custodian, whether or not the contents of those records are exempt from disclosure and shall, when requested to do so, provide in writing within seven days following receipt of a request, a statement as to the existence, quantity, form and nature of records relating to a particular subject or questions with enough specificity to enable a requester to identify records in order to make a request under (b). 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.
- ...
- k.) Release of documentary public information, whether for inspection of the original or by providing a copy, shall be governed by the California Public Records Act Government Code Section 6250 et seq.) in particulars not addressed by this ordinance and in accordance with the enhanced disclosure requirement provided in this ordinance.

Memorandum

1.) Inspection and copying of documentary public information stored in electronic form shall be made available to the person requesting the information in any form requested which is available to or easily generated by the department, its officers or employees, including disk, tape, printout or monitor at a charge no greater than the cost of the media on which it is duplicated. Inspection of documentary public information on a computer monitor need not be allowed where the information sought is necessarily and unseparably intertwined with information not subject to disclosure under this ordinance. Nothing in this section shall require a department to program or reprogram a computer to respond to a request for information or to release information where the release of that information would violate a licensing agreement or copyright law.

Section 67.21-1 addresses the City's policy regarding the use and purchase of computer systems.

Section 67.21-1 provides:

a.) It is the policy of the City and County of San Francisco to utilize computer technology in order to reduce the cost of public records management, including the costs of collecting, maintaining, and disclosing records subject to disclosure to member of the public under this section. To the extent that it is technologically and economically feasible, department that use computer systems to collect and store public records shall program and design the systems to ensure convenient, efficient, and economical public access to records and shall make public records easily accessible over public networks such as the Internet.

b.) Department purchasing new computer systems shall attempt to reach the following goals as a means to achieve lower costs to the public in connection with the public disclosure of records;

1.) Implementing a system in which exempt information is segregated or filed separately from otherwise disclosable information.

2.) Implementing a system that permits reproduction of electronic copies of records in a format that is generally recognized as an industry standard format.

3.) Implementing a system that permits making records available through the largest non-profit, non-proprietary public computer network, consistent with the requirement for security of information.

Section 67.26 provides:

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.

Memorandum

Information that is exempt from disclosure shall be masked, deleted or otherwise segregated in order that the nonexempt portion of a requested record may be released, and keyed by footnote or other clear reference to the appropriate justification for withholding required by section 67.27 of this article. This work shall be done personally by the attorney or other staff member conducting the exemption review. The work of responding to a public-records request and preparing documents for disclosure shall be considered part of the regular work duties of any city employee, and no fee shall be charged to the requester to cover the personnel costs of responding to a records request.

Section 67.27 provides:

Any withholding of information shall be justified in writing, as follows:

- a.) A withholding under a specific permissive exemption in the California Public Records Act, or elsewhere, which permissive exemption is not forbidden to be asserted by this ordinance, shall cite that authority.
- b.) A withholding on the basis that disclosure is prohibited by law shall cite the specific statutory authority in the Public Records Act of elsewhere.
- c.) A withholding on the basis that disclosure would incur civil or criminal liability shall cite any specific statutory or case law, or any other public agency's litigation experience, supporting that position.
- d.) When a record being requested contains information, most of which is exempt from disclosure under the California Public Records Act and this Article, the custodian shall inform the requester of the nature and extent of the nonexempt information and suggest alternative sources for the information requested, if available.

Section 67.31 provides:

...The Clerk of the Board of Supervisors shall provide a full-time staff person to perform administrative duties for the Sunshine Ordinance Task Force and to assist any person in gaining access to public meetings or public information. The Clerk of the Board of Supervisors shall provide that staff person with whatever facilities and equipment are necessary to perform said duties.

The California Public Records Act is located in the state Government Code Sections 6250 et seq. All statutory references, unless stated otherwise, are to the Government Code.

Section 6253 provides.

Memorandum

a.) Public records are open to inspection at all times during the office hours of the state or local agency and every person has a right to inspect any public record, except as hereafter provided. Any reasonably segregable portion of a record shall be available for inspection by any person requesting the records after deletion of the portions that are exempted by law.

b.) Except with respect to public records exempt from disclosure by express provisions of law, each state or local agency, upon a request for a copy of records that reasonably describes an identifiable record or records, shall make the records promptly available to any person upon payment of fees covering direct costs of duplication, or a statutory fee if applicable. Upon request, an exact copy shall be provided unless impracticable to do so.

c.) Each agency, upon a request for a copy of records, shall within 10 days from receipt of the request, determine whether the request, in whole or in part, seeks copies of disclosable public records in the possession of the agency and shall promptly notify the person making the request of the determination and the reasons therefore....

Section 6253.9 provides:

a.) Unless otherwise prohibited by law, any agency that has information that constitutes an identifiable public record not exempt from disclosure pursuant to this chapter that is in an electronic format shall make that information available in an electronic format when requested by any person and, when applicable, shall comply with the following:

(1) The agency shall make the information available in any electronic format in which it holds the information.

(2) Each agency shall provide a copy of an electronic record in the format requested if the requested format is one that has been used by the agency to create copies for its own use or for provision to other agencies. The cost of duplication shall be limited to the direct cost of producing a copy of a record in any electronic format.

b.) Notwithstanding paragraph (2) of subdivision a.), the requester shall bear the cost of producing a copy of the record, including the cost to construct a record, and the cost of programming and computer services necessary to produce a copy of the record when either of the following applies:

(1) In order to comply with the provisions of subdivision a.), the public agency would be required to produce a copy of an electronic record

Memorandum

and the record is one that is produced only at otherwise regularly scheduled intervals.

- (2) The request would require data compilation, extraction, or programming to produce the record.
- c.) Nothing in this section shall be construed to require the public agency to reconstruct a record in an electronic format if the agency no longer has the record available in an electronic format.
- d.) If the request is for information in other than electronic format, and the information also is in electronic format, the agency may inform the requester that the information is available in electronic format.
- e.) Nothing in this section shall be construed to permit an agency to make information available only in electronic format.
- f.) Nothing in this section shall be construed to require the public agency to release an electronic record in the electronic form in which it is held by the agency if its release would jeopardize or compromise the security or integrity of the original record or of any proprietary software in which it is maintained.
- g.) Nothing in this section shall be construed to permit public access to records held by any agency to which access is otherwise restricted by statute.

Section 6255 provides:

- a.) The agency shall justify withholding any record by demonstrating that the record in question is exempt under express provisions of this chapter or that on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record.
- b.) A response to a written request for inspection or copies of public records that includes a determination that the request is denied, in whole or in part, shall be in writing.



<complaints@sfgov.org>
06/06/2008 04:29 PM

To <soft@sfgov.org>
cc
bcc
Subject Sunshine Complaint

History: This message has been forwarded.

Submitted on: 6/6/2008 4:29:10 PM

Department: City Attorney's Office

Contacted: PIO's Matt Dorsey and Alexis Thompson

Public_Records_Violation: Yes

Public_Meeting_Violation: No

Meeting_Date:

Section(s)_Violated: 6253 (b), 67.21 (L), 67.21-1, 67.26, 67.27, 6253.9

Description: I requested the Word version of a PDF document at the City Attorney's office and they refuse to provide it. The PDF version strips all metadata in the Word document without showing the metadata redactions nor justifying them nor footnoting the exemption.

Hearing: Yes

Date: 6/4/08

Name: Kimo Crossman

Address:

City:

Zip:

Phone:

Email:

Anonymous:

Confidentiality_Requested: Yes



"Kimo Crossman"
<...>
06/04/2008 03:00 PM

To "SOTF" <sotf@sfgov.org>
"Matt Dorsey" <Matt.Dorsey@sfgov.org>, "Alexis
Thompson" <Alexis.Thompson@sfgov.org>, "Cityattorney"
<cityattorney@sfgov.org>
bcc
Subject SOTF Complaint - City Attorney revisal to provide document
in Word format

Please include the below email chain, images and attachments in the file for this complaint.

Submitted on: 6/4/2008

Department: City Attorney

Contacted: PIO's Matt Dorsey and Alexis Thompson

Public_Records_Violation: Yes

Public_Meeting_Violation: No

Meeting_Date:

Section(s)_Violated: 6253 (b), 67.21 (L), 67.21-1, 67.26, 67.27, 6253.9

Description:

I requested the Word version of a PDF document at the City Attorney's office and they refuse to provide it. The PDF version strips all metadata in the Word document without showing the metadata redactions nor justifying them nor footnoting the exemption.

Hearing: Yes

Date: 6/4/08

Name: Kimo Crossman

Email:

From: Matt Dorsey [mailto:Matt.Dorsey@sfgov.org]

Sent: Wednesday, June 04, 2008 2:24 PM

To:

Subject: Response to your request

Dear Mr. Crossman,

You have asked that we provide you with the "Word version" of a record that you have in PDF. The record is a September 25, 2007 letter to the Board of Supervisors and Ethics Commission from the Mayor, transmitting written charges of official misconduct "In the Matter of Charges Against Edmund Jew."

We decline to provide this record in Word format. In a letter to the Sunshine Ordinance Task Force on September 19, 2006, which is on the City Attorney's Web site under City Attorney Opinions, this office explained the basis for its conclusion that neither the Public Records Act nor the Sunshine Ordinance requires City departments to provide a record in Word. We continue to adhere to that view.

Best,

MATT DORSEY

Public Information Officer

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CITY AND COUNTY OF SAN FRANCISCO

OFFICE OF THE CITY ATTORNEY



DENNIS J. HERRERA
City Attorney

MATT DORSEY
Public Information Officer

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July 18, 2008

Honorable Members
SUNSHINE ORDINANCE TASK FORCE
c/o Frank Darby, Jr.
Room 244, City Hall
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102

Re: Complaint No. 08032

Dear Honorable Task Force Members:

This complaint involves a request to the San Francisco City Attorney's Office for the "Word" version of a letter dated September 25, 2007 to the Board of Supervisors and the Ethics Commission from the Mayor transmitting written charges of official misconduct "In the Matter of Charges Against Edmund Jew."

In response to the request, this office declined to provide the record for the reasons set forth in a September 19, 2006 memorandum to the Sunshine Ordinance Task Force that is posted on this office's web site.

The record in question is public and the requester is entitled to a copy of it. The City has provided the requester with a copy of the document in PDF. The requester asserts that this office is required to provide the Word version. But we remain of the opinion that neither the California Public Records Act nor the San Francisco Sunshine Ordinance requires the office to provide the record in question in "Word." The reasons for this conclusion have already been provided to this body in the September 19, 2006 memorandum that addresses this issue. Another copy is enclosed for your convenience.

We will have someone available on stand-by in City Hall to go to the hearing when this matter is being considered. We will inform the Administrator before the meeting what phone or cell number to call when the item is ready to be called.

Very truly yours,

A handwritten signature in black ink, appearing to read "Matt Dorsey", written over the typed name and title.

MATT DORSEY
Public Information Officer



DENNIS J. HERRERA
City Attorney

PAUL ZAREFSKY
Deputy City Attorney

DIRECT DIAL: (415) 554-4652
E-MAIL: paul.zarefsky@sfgov.org

MEMORANDUM

TO: Honorable Members
Sunshine Ordinance Task Force

FROM: Paul Zarefsky
Deputy City Attorney

DATE: September 19, 2006

RE: Providing Electronic Records In PDF Rather Than Word Format When Responding
To A Public Records Request

This Office has orally advised City departments that, in response to a public records request for an electronic copy of a record, a City department may provide the record to the requester in PDF¹ rather than Word format. In this memorandum, we address the legal principles supporting this conclusion. The issue potentially affects all City departments, because all departments maintain electronic records. The volume of such records is huge, and we expect that the issue will arise in future public records requests for electronic records.

We address this issue from two perspectives – (1) protecting "metadata" hidden in the electronic record and (2) protecting the text of the electronic record. This memorandum does not address any complaint before the Task Force. Rather, we intend to provide general advice on this issue.

Protecting Metadata Hidden In The Electronic Record

A Word document – unlike an electronic record in PDF format – contains "metadata." This term generally refers to information about an electronic record that does not appear in the text but is automatically generated by the program when a text is created, viewed, copied, edited, printed, stored, or transmitted using a computer. The metadata are typically embedded in the record in a manner not readily viewed or understood by persons without specialized computer training, that enables one to locate information that is not shown in the text. We use the term "metadata" broadly to include any information embedded in the record that is not visible in the text.

The metadata may include a wide variety of information that the City has a right – and, in some cases, a legal duty – to withhold from public view. For example, earlier versions of an electronic record are present in metadata and often will include recommendations of the author of a draft, which the Sunshine Ordinance allows the City to withhold from disclosure. (S.F.

¹ The term "PDF" is an abbreviation for Portable Document Format. As the term suggests, a PDF record functions as a "portable" document in that it may be transmitted electronically as a whole document and viewed and read on a computer screen. A scanned PDF record essentially is a picture of a document that may be viewed and read on a computer screen. A searchable PDF record permits the viewer/reader to search the document for specific words or phrases and to cut and paste from the document. Neither type of PDF record contains metadata embedded in the record.

Memorandum

TO: Honorable Members
Sunshine Ordinance Task Force

DATE: November 2, 2006

PAGE: 2

RE: Providing Electronic Records In PDF Rather Than Word Format When Responding
To A Public Records Request

Admin. Code §67.24(a)(1).) Such passages could include edits that are part of the author's thought process and were never intended to be communicated to another person. As a second example, earlier versions of an electronic record that are present in metadata may include information the disclosure of which would violate a third party's privacy – a right the law zealously safeguards. (Cal. Gov. Code §§ 6250, 6254(c); S.F. Admin. Code §67.1(g); Cal. Const., Art. I, sec. 1.) A wide range of types of information may be encompassed within the right of privacy; everything from residential phone numbers and Social Security numbers to sensitive medical, financial, and sexual data to information provided by, and the identity of, whistleblowers. As a third example, metadata may include communications between attorney and client that do not appear in the text of the record. The law protects confidential attorney-client communications from disclosure. (Cal. Evid. Code §954.) These examples are merely illustrative of the broader point that metadata may contain information specifically subject to redaction under the Public Records Act and the Sunshine Ordinance.

If a department were to give a requester a document in Word format, the department would be required to review the metadata embedded in the document. Failure to conduct this review would risk disclosure of privileged material. Yet reviewing the metadata would be a laborious, burdensome, and problematic task – different in nature and magnitude from the process of reviewing the text to determine information that should be redacted and information that is reasonably segregable from that which should be redacted. Electronic records may be adapted from any number of earlier texts – which would themselves contain metadata – and may have been subject to numerous edits. Information recorded in the process of creating and editing the text of such a document may be unknown to the author, the sender, and/or the recipient. The investigation necessary to determine whether redactions in metadata are legally warranted would in many cases be daunting. Merely identifying and interpreting certain of the metadata would require considerable expertise beyond the skill and capacity of all but a small number of City employees. And there is considerable risk that even those with the expertise would not locate all the metadata.

In addition, the metadata embedded in a Word document could reveal sensitive information about the operation of the City's computer and communications system that could be used by a third party to undermine the integrity and security of that system. For example, the disclosure of such information as unique identifiers for individual computer terminals and computer servers, and the location of information in a department's computer system, could compromise the integrity and security of the system. We do not understand that disclosure of metadata alone would in itself permit an unscrupulous individual to "hack" into the City's computer system. But should such an individual find his or her way into the City's system, knowledge about metadata gleaned from a Word document made available to the public could make it easier for that person to navigate his or her way through the system, locate sensitive files, alter or delete documents, and generally undermine the security of records within the system.

In making decisions about disclosure of public records, the City may not inquire as to a requester's purpose, or the use the requester may make of the information obtained. (Cal. Gov. Code §6257.5; S.F. Admin. Code §67.25(c).) Requests from prudent, civic-minded persons must be treated the same as requests from reckless or ill-motivated persons. Further, disclosure of a record to one member of the public generally precludes the City from withholding that record from another member of the public. (Cal. Gov. Code §6254.5.) Thus, even if the City is certain that a particular requester has a legitimate purpose and would not misuse – or even review –

Memorandum

TO: Honorable Members
Sunshine Ordinance Task Force

DATE: November 2, 2006

PAGE: 3

RE: Providing Electronic Records In PDF Rather Than Word Format When Responding To A Public Records Request

information contained in the metadata of a requested record, the City does not have the luxury of indulging benign assumptions about requesters when determining its response to a public records request for an electronic record in Word format.

These problems must be understood not from the vantage point of one isolated electronic record that may be the subject of a Task Force hearing. City government is comprised of scores of departments and even more boards, commissions, and advisory bodies, and there are literally millions of electronic records within the City's files, that have been created, edited, transmitted, or received by a workforce of approximately 25,000 to 30,000 employees. The staff resources of the City – technical, professional, and clerical – that may be devoted to responding to public records requests are limited.

If the City is required to disclose documents in Word format in response to a public records request, there could be a significant adverse impact on the conduct of City business – both everyday public business, and the business of responding to public records requests. The City has no control over the number and scope of public records requests it receives, or the number and scope of requests filed by a single person or small group of persons. The added burden of having to review metadata in electronic records could be crippling if the City is required to provide electronic records to requesters in Word rather than PDF format.

The City's duty to respond to a public records request is limited by a rule of reason. It has long been understood that public records laws do not impose absolute requirements on public entities. Rather, the efforts required to respond to a public records request are inherently bounded by a standard of reasonableness. In *Bruce v. Gregory* (1967) 65 Cal.2d 666, the California Supreme Court articulated this elementary principle of public records law:

We ... hold that the rights created by [predecessor statutes to the Public Records Act] are, by their very nature, not absolute, but are subject to an implied rule of reason. Furthermore, this inherent reasonableness limitation should enable the custodian of public records to formulate regulations necessary to protect the safety of the records against theft, mutilation or accidental damage, to prevent inspection from interfering with the orderly function of his office and its employees, and generally to avoid chaos in the record archives.

Id. at 676. Both the California courts and the California Attorney General have extended *Bruce's* implied rule of reason to public records requests under the Public Records Act. (*Rosenthal v. Hansen* (1973) 34 Cal.App.3d 754, 761; 64 Ops.Cal.Atty.Gen. 186, 189-91 (1981) [Op. No. 80-1106]; 64 Ops.Cal.Atty.Gen. 317, 321 (1981) [Op. No. 80-1006]; 76 Ops.Cal.Atty. Gen. 235, 241 (1993) [Op. No. 93-702].)

There is no indication that the Board of Supervisors, in adopting the Sunshine Ordinance in 1993, or the voters, in amending the Ordinance in 1999, intended to jettison this longstanding principle of public records law. Indeed, in the context of assessing under both the Public Records Act and the Sunshine Ordinance the reasonableness of a search for records, the San Francisco Superior Court has ruled that the same reasonableness limitations applicable to the Act apply as well to the Ordinance.²

² *Western Select Securities, Inc. v. Murphy, et al.*, S.F. Superior Court No. 312310, Slip Op. at 5-6 (copy attached; stamped August 24, 2000, issued December 1, 2000). This ruling was

Memorandum

TO: Honorable Members
Sunshine Ordinance Task Force

DATE: November 2, 2006

PAGE: 4

RE: Providing Electronic Records In PDF Rather Than Word Format When Responding
To A Public Records Request

In addition, Section 67.21-1(a) of the Sunshine Ordinance states that "[I]t is the policy of the City and County of San Francisco to utilize computer technology *in order to reduce the costs of public records management, including the costs of collecting, maintaining, and disclosing records subject to disclosure to members of the public under this section.*" (S.F. Admin. Code §67.21-1(a) [emphasis added].)³

A court would likely conclude that these principles of reasonableness and cost containment that govern disclosure of public records under the Public Records Act and the Sunshine Ordinance permit the City to decline to provide to a requester metadata that is embedded in an electronic record such as a Word document. To require departments to disclose electronic records in Word format would necessitate their exhaustively searching and reviewing metadata in those records before finalizing a response to the requester. This process would entail considerable cost to the City, given the technical expertise and staff resources that would have to be devoted to it. Imposing this process on the City would contradict the City's own policy of using computer technology to reduce the costs incurred in disclosing public records.

Protecting The Text Of The Electronic Record

The text of a Word document may be easily edited or otherwise altered by the requester or by persons to whom the requester makes the document available. The alteration would not be obvious or readily discernible to the average person or even in many cases to someone generally familiar with the document. As a result, providing a record in Word format to a requester jeopardizes the integrity of the record. That format makes it easy for the requester or others to change the record and then present the altered record as the original. Apart from any such questionable purpose, if the City provides a record in Word format and the requester or others edit or otherwise alter the record, there is the potential for creating confusion, even inadvertently, as to whether the original record or the altered version is the true public record.

The Public Records Act allows public entities to address these concerns in making records available to the public. Section 6253.9 of the Act addresses information in an electronic format. (Cal. Gov. Code §6253.9.) Subsection (f) states: "Nothing in this section shall be construed to require the public agency to release an electronic record in the electronic form in which it is held by the agency if its release would jeopardize or compromise the security or integrity of the original record or of any proprietary software in which it is maintained." (Cal. Gov. Code §6253.9(f).) Disclosure of a record in Word format could jeopardize the integrity of

not disturbed on appeal. *See Western Select Securities, Inc. v. Superior Court*, Court of Appeal, First District, Case No. A093500, May 3, 2001 (order denying petition for writ of mandate). While a trial court opinion generally may not be cited as precedent in a judicial proceeding (*see* Cal. Rule of Court 977), this trial court opinion nonetheless may shed light on whether a court would be receptive to the point that the Sunshine Ordinance carries forward the principle, recognized both pre- and post-Public Records Act, that public records laws are subject to an implied or inherent rule of reason.

³ In addition, we note that the Sunshine Ordinance endorses "[I]mplementing a system that permits reproduction of electronic copies of records *in a format that is generally recognized as an industry standard format.*" (S.F. Admin. Code §67.21-1(b)(2) [emphasis added].) It is our understanding that PDF versions of electronic records are generally recognized as an "industry standard format" for providing copies of electronic records.

Memorandum

TO: Honorable Members
Sunshine Ordinance Task Force
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the record because the text is so easily manipulated. Subsection (f) thus gives City departments discretion to choose to provide the record to a requester in other more secure formats, and nothing in the Sunshine Ordinance changes this result.

We recognize that computer-savvy experts using sophisticated technological aids are able to tamper with electronic records in some formats other than Word. But this possibility does not change the legal analysis. Subsection (f) permits a department to provide an electronic record to a member of the public in a format less susceptible to textual manipulation than the format requested. A Word document is much more susceptible to textual manipulation, as compared, for example, to a record in scanned PDF format. So long as the integrity of the record is jeopardized by making it available in Word format, Subsection (f) permits the City to provide it in another format.

Conclusion

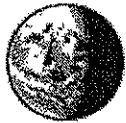
A court would likely conclude that a City department has discretion under both the Public Records Act and the Sunshine Ordinance to provide an electronic record to a public records requester in PDF rather than Word format.⁴

* * * * *

We hope this memorandum proves useful to the Task Force in its analysis and discussion of an important issue. If there are any questions or concerns on the general issue, divorced from the particulars of any specific case, please feel free to contact this office.

P.Z.

⁴ This memorandum does not address the power of a court in a litigation context to order or limit access of a party to another party's electronic records.



"Kimo Crossman"
<kimo@webnetic.net>
07/21/2008 04:42 PM

To "SOTF" <sotf@sfgov.org>, "Matt Dorsey"
<Matt.Dorsey@sfgov.org>
cc <grossman356@mac.com>
bcc
Subject RE: #08032_Kimo Crossman v City Attorney's Office, CAO
response

Matt

We have of course provided additional legal reasoning that justifies
delivery of the Word version (which you have at one time agreed to provide)
- which your office has not addressed including references to 67.21-1
(Electronic copy) and 6253 (b) (Exact Copy) and failure to indicate with
keynotes redactions of metadata in 67.26

-----Original Message-----

