

Date: January 8, 2008

Item No. 1
File No. 07056

SUNSHINE ORDINANCE TASK FORCE

AGENDA PACKET CONTENTS LIST*

- Complaint by: Myrna Lim v. Ethics Commission**
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Completed by: Frank Darby

Date: January 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



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ORDER OF DETERMINATION
October 23, 2007

October 26, 2007

Myrna Lim
226 Geneva Ave
San Francisco, CA 94112

John St. Croix
Executive Director
Ethics Commission
30 Van Ness Ave, Suite 3900
San Francisco, CA 94102

Re: Complaint #07056 filed by Myrna Lim against the Ethics Commission for alleged violation of Sunshine Ordinance §67.21 for failure to provide requested records.

Based on the information provided to the Task Force from the Complainant Myrna Lim, Respondent John St. Croix, and hearing public comment, the following Order of Determination is adopted:

The Sunshine Ordinance Task Force finds the Ethics Commission in violation of Section 67.21 of the Sunshine Ordinance for failure to provide the records requested. The Commission is ordered to provide the responsive documents requested that have not been provided to Ms. Lim within 5 days after the issuance of this Order of Determination.

This Order of Determination was adopted by the Sunshine Ordinance Task Force on October 23, 2007 by the following vote: (Chu / Cauthen)
Ayes: Craven, Knee, Cauthen, Chu, Wolfe, Chan, Goldman, and Williams
Noes: Pilpel
Recused: Comstock.

A handwritten signature in black ink, appearing to read "Erica Craven".

Erica Craven, Vice-Chair
Sunshine Ordinance Task Force

cc: Ernie Llorente, Deputy City Attorney



ETHICS COMMISSION CITY AND COUNTY OF SAN FRANCISCO

November 8, 2007

SUSAN J. HARRIMAN
CHAIRPERSON

EMI GUSUKUMA
VICE-CHAIRPERSON

EILEEN HANSEN
COMMISSIONER

JAMIENNE S. STUDLEY
COMMISSIONER

CHARLES L. WARD
COMMISSIONER

JOHN ST. CROIX
EXECUTIVE DIRECTOR

The Sunshine Ordinance Task Force
c/o The Board of Supervisors
1 Dr. Carlton B. Goodlett Place
City Hall, Room 244
San Francisco, California 94102

Dear Members of the Sunshine Ordinance Task Force:

I write in response to the Sunshine Ordinance Task Force's Order of Determination regarding Complaint number 07056. The order is dated October 26, 2007, and I received it by email from the Task Force on October 30.

The Task Force concluded that the Commission violated San Francisco Administrative Code section 67.21 by declining to disclose records related to an enforcement investigation. The Task Force's decision acknowledged that the San Francisco Charter makes such records confidential except when state law requires their disclosure. The Task Force concluded that because the Ethics Commission's investigations do not serve a "law enforcement" function, the records are not exempt from disclosure under the California Public Records Act and therefore must be disclosed.

As discussed below, the Task Force's Order is based on an incomplete analysis of applicable law. The Charter prohibits disclosure of investigative files except when such disclosure is required by state law. In its formal regulations, the Ethics Commission has interpreted that Charter requirement to flatly prohibit the disclosure of Commission investigation records before the Commission makes a finding of probable cause. The Commission's regulatory interpretation – and staff's decision in this case not to disclose the requested records – finds support in the Public Records Act, which exempts from disclosure several categories of records pertaining to the Commission's investigative files as discussed further below. Thus, while I respect the Task Force's opinion, the Charter prohibits the Commission from disclosing the investigation records here.

San Francisco Charter Confidentiality Requirement

The San Francisco Charter charges the Ethics Commission with conducting investigations related to campaign finance, lobbying, conflicts of interest, and government ethics. *See* S.F. Charter § C3.699-13. The Charter provides that records of Commission investigations, unlike other records, must remain confidential:

The investigation *shall* be conducted in a confidential manner. Records of any investigation *shall* be considered confidential information to the extent permitted by state law.

See S.F. Charter § C3.699-13 (emphasis added). The Charter's use of the term "shall" is significant. That term means that the Commission lacks discretion to disclose investigative records unless state law mandates their disclosure.

The policies underlying these confidentiality requirements are so significant that any breach carries serious penalties. The Charter provides that:

[a]ny member or employee of the commission or other person who, prior to a determination concerning probable cause, discloses information about any preliminary investigation, except as necessary to conduct the investigation, shall be deemed guilty of official misconduct. The unauthorized release of confidential information shall be sufficient grounds for the termination of the employee or removal of the commissioner responsible for such release.

See S.F. Charter § C3.699-13. Thus, as Executive Director of the Commission, I must take very seriously my responsibilities to maintain the confidentiality of investigative records.

The Ethics Commission and its staff must comply with the strict confidentiality requirements of the Charter, even if doing so might conflict with the mandates of the Sunshine Ordinance. As Deputy City Attorney Llorente advised the Task Force in advance of the October 23 meeting, whenever there is a conflict between the Charter and a local municipal ordinance such as the Sunshine Ordinance, the provisions of the Charter control. *See* October 16, 2007 Memorandum from Ernest H. Llorente. The Charter – which requires the Ethics Commission to maintain the confidentiality of records unless disclosure is required by state law – supersedes any conflicting provisions in the Sunshine Ordinance that would otherwise require disclosure of an investigative record.

Ethics Commission Enforcement Regulations

The Charter grants the Ethics Commission the power to adopt regulations "consistent with and related to carrying out the purposes and provisions" of the Charter related to the subject matter within the Commission's purview. S.F. Charter § 15.102. The Charter similarly grants the Ethics Commission authority to adopt regulations relating to local open meetings and public records ordinances, primarily the Sunshine Ordinance. *Id.*

Acting under that authority, the Ethics Commission's Regulations for Investigations and Enforcement Proceedings implement Charter section C3.699-13. The preamble to the regulations reiterate the importance of "[p]rotecting the privacy rights of those accused of ethics violations by maintaining the confidentiality of complaints filed with, and investigations conducted by, the Commission." See Regulations for Investigations and Enforcement Proceedings ("Regs.") § I(4). Specifically, the regulations provide that

[n]o complaint, response thereto, investigative file or information contained therein, or Commissioner and staff deliberations about complaints shall be disclosed to any person other than a respondent or respondent's representative, the City Attorney, District Attorney, a court, a law enforcement agency, or otherwise as necessary to the conduct of an investigation, prior to a determination concerning probable cause. After a determination of probable cause, complaints, related documents, and investigative files shall not be disclosed except as required by the California Public Records Act (Government Code section 6250).

Regs. § XIII(B)(1) (emphasis added). When the Commission dismisses a complaint prior to a finding of probable cause, the regulations permit the Executive Director only to issue a "generic description" and "summary," and even then, the Executive Director must take care to "comply with the confidentiality requirements of the Charter." Regs. § XIII(L).

Whenever the Ethics Commission's staff receives a request for public records, we analyze whether state law requires disclosure of each potentially responsive record, as the Charter requires. In this analysis, we are guided, and typically constrained, by the regulations' binding prohibition on disclosure of any investigative records prior to a probable cause finding, except to certain parties or if necessary to conduct the investigation. Regs. § XIII(B)(1).

California Public Records Act Exemptions for Ethics Commission Investigative Records

As discussed above, the Charter permits disclosure of the Commission's investigative records *only* when state law *requires* it. In all other circumstances, the Charter prohibits any such disclosure. The California Public Records Act ("CPRA") generally requires disclosure of public records but enumerates several exceptions to the disclosure requirement. Other state statutes and decisions independent of the CPRA further restrict the public's right to inspect particular public records. Whenever one of these statutory exemptions applies to a record related to a Commission investigation, the Charter requires that the record remain confidential. The non-disclosure mandate in the Ethics Commission's Regulations for Investigations and Enforcement Proceedings is based on an analysis of these exemptions.

Over the course of years, the City Attorney's Office repeatedly has advised the Ethics Commission that several different exemptions in state law apply to records related to Commission investigations. As an example, I am attaching to this letter a June 27, 2005 memorandum from the City Attorney's Office to members of the Ethics Commission setting forth the most commonly applicable exemptions requiring non-disclosure of Ethics Commission

records. We have used this advice to guide our review of files whenever we determine how to respond to requests for public records.

At its October 23, 2007 meeting, the Task Force analyzed only one of the several applicable statutory exceptions – California Government Code section 6254(f) – and determined that it did not apply to Ethics Commission investigations. The discussion at the Task Force – and the written analysis in the meeting's agenda packet – focused primarily on section 6254(f), an exception to the CPRA that allows agencies to withhold investigatory records compiled for "correctional, law enforcement or licensing purposes." The Task Force concluded that the Ethics Commission does not perform a "law enforcement" function and therefore that withholding the records could not be justified under the "law enforcement" exception. As I expressed at that meeting, I disagree with the Task Force's analysis and conclusion. But more importantly, the Task Force failed to analyze several other statutory exemptions in state law that apply to many Ethics Commission investigative records, and that apply to the records in this case. For example:

- *Private information and other constitutionally-protected records:* California Government Code section 6254(k) provides that documents may be exempt from disclosure if the United States Constitution, California Constitution or other laws prohibit their disclosure. Records in Ethics Commission files sometimes contain private information about complainants, respondents, witnesses and other persons. Disclosure of such information may violate those individuals' rights to personal privacy or association protected under the federal and state constitutions. See Cal. Const., Art. I, § 1. In addition, California Government Code section 6254(c) provides statutory protection for the confidentiality of personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of privacy. See Cal. Gov't Code § 6254(c).
- *Privileged communications:* Documents protected by the attorney-client privilege are exempt from disclosure. See Cal. Gov't Code § 6254(k); Cal. Evid. Code § 954. Our investigators work closely with the City Attorney's Office, and investigative records often contain confidential communications between Commission staff and counsel.
- *Identity of confidential whistleblowers:* Records that reveal the identity of persons complaining to the City about illegal acts are also exempt. See Cal. Gov't Code § 6254(k); Cal. Evid. Code § 1041. See also S.F. City Charter § F1.107(c) (recognizing the need to protect the confidentiality of whistleblowers and to protect from retaliation City officers and employees who file a complaint with or provide information to the Ethics Commission).
- *Official information privilege:* Records that reveal information gathered by the Commission under assurances of confidentiality are exempt under the official information privilege if the public interest in nondisclosure outweighs the public interest in disclosure. See Gov't Code § 6254(k); Cal. Evid. Code § 1040.
- *Deliberative process:* The CPRA also authorizes an agency to withhold records when the requested materials would expose the agency's decision-making process and discourage candid discussion, undermining the agency's ability to perform its investigatory and prosecutorial function. See Cal. Gov't Code § 6255; *Times Mirror Co. v. Superior Court*, 53 Cal.3d 1325 (1991). This exception, commonly known as the deliberative process privilege, protects records that reflect deliberative or policymaking processes. See *Wilson v. Superior Court*, 51 Cal. App. 4th 1136 (1996). Because investigations almost always

raise legal and policy issues involving local law and the Commission's authority, many of the records in the Ethics Commissions files reflect the staff's deliberative processes.

- *Records for which public interest in non-disclosure clearly outweighs public benefit of disclosure:* California Government Code section 6255 permits an agency to withhold a record if the public interest served by not making the record public clearly outweighs the public interest served by disclosure of the record. See Cal. Gov't Code § 6255; *Michaelis, Montanari & Johnson v. Superior Court*, 38 Cal. 4th 1065, 1071 (2006). There are at least six distinct factors that favor non-disclosure of records related to Ethics Commission investigations. *First*, because of the sensitive and often high-stakes nature of the charges underlying many ethics complaints, individuals charged with misconduct have an interest in maintaining confidentiality at least until the Commission decides whether the complaint has merit. These individuals commonly are candidates or elected officials, and the public disclosure of an investigation sometimes can be damning to their reputations and political careers regardless of the investigation's ultimate outcome. The Ethics Commission has recognized as much by designing its regulations to protect "the privacy rights of those accused of ethics violations." Regs. § I(4). *Second*, complainants similarly often have an interest in not being publicly identified. In our experience, complainants – who are sometimes colleagues, political allies or opponents of the respondents – often fear retribution for filing complaints. *Third*, for similar reasons, witnesses contacted or investigated by staff also often wish to remain anonymous to the extent allowed by law. Investigative records often refer to witnesses or contain information that make witnesses reasonably identifiable. *Fourth*, frequent disclosure of complaint-related information prior to findings of probable cause may undermine the integrity of the Ethics Commission and encourage the filing of frivolous complaints. Because the mere fact of an Ethics Commission investigation can be notable, political adversaries might use publicly disclosed records of ongoing or confidentially dismissed complaints as political weapons. *Fifth*, disclosure sometimes reveals facts to individuals under investigation that can undermine staff's investigations, depriving staff of critical investigative tools before they have contacted relevant witnesses. *Sixth*, disclosing staff notes and internal memoranda regarding investigations may reveal investigative techniques and priorities that will undermine the Commission's ability to manage effective investigations.

These six factors implicate a number of interests, including the dignitary and reputational interests of people who are involved one way or the other in a Commission investigation. In combination, these factors highlight the nexus between maintaining the confidentiality of investigations and conducting effective investigations. This, of course, is precisely the type of interest the Charter recognizes in Section 15.102, in authorizing the Commission to adopt rules and regulations "consistent with and related to carrying out the purposes of this Charter and ordinances related to campaign finances, conflicts of interest, lobbying, campaign consultants, and government ethics."

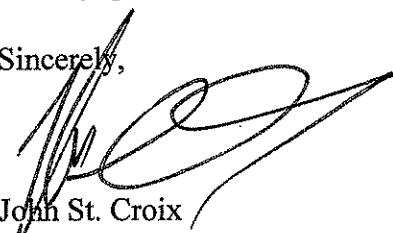
Whenever any of these exemptions apply to a particular record, the Ethics Commission cannot disclose the record. Exercising its power under the Charter, the Ethics Commission has adopted regulations concluding that prior to a finding of probable cause, state law never requires disclosure of investigation records. Regs. § XIII(B)(1). Even after a finding of probable cause, Commission staff must engage in a careful analysis to determine whether a particular record should be disclosed. *Id.* Violations of that mandate are punishable as official misconduct and can result in termination of employment.

My staff has examined the records requested by the complainant here, as it examines the records potentially responsive to every request, and has determined that the Charter, the Commission's regulations, and one or more of the exceptions under state law require non-disclosure of the particular records that we have withheld. Our review of records is always specific and thorough, focusing on whether state law requires disclosure.

Please be assured that the Commission is committed to the principles of public transparency that underlie the Sunshine Ordinance. Commission staff spends hundreds of hours annually reviewing potentially responsive documents, and we have provided hundreds of documents in response to various requests while declining to disclose those that, based on particularized analysis, we cannot disclose under the Charter, the regulations and the CPRA. We applied the same document-by-document review in this case, and will continue to do so in the future.

Please feel free to contact me if you have any questions.

Sincerely,



John St. Croix
Executive Director

Cc: Members of the Ethics Commission

Enclosure



DENNIS J. HERRERA
City Attorney

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MEMORANDUM

TO: MEMBERS,
San Francisco Ethics Commission

FROM: CLAIRE SYLVIA *CS/mr*
Deputy City Attorney

DATE: June 27, 2005

RE: Public Records Issues Associated With The Investigation and Enforcement Process

I. INTRODUCTION

This memorandum responds to questions posed during the Commission's discussion at its May meeting about the investigation and enforcement process. Our office had advised the Commission in a memorandum prepared for the May meeting, that if an exemption in the California Public Records Act applies to a record related to one of its investigations, the Charter provides that the record shall be considered confidential. A member of the Commission then inquired under what circumstances State law would provide for an exemption for records related to an investigation.

II. SUMMARY OF ADVICE

Generally, the City must make public records available to the public for inspection unless the record is exempted by law from disclosure. The Charter requires the Commission to keep records of its investigations confidential to the extent permitted by state law. Accordingly, if an exemption exists under state law that the Commission could apply to a record related to an investigation, the Charter requires the Commission to claim the exemption and not disclose the record. Some of the most common types of investigation records that the Charter requires the Commission to keep confidential because of state law exemptions include those for which disclosure would constitute an unwarranted invasion of personal privacy, attorney-client communications, documents that disclose the identity of persons complaining about illegal acts, documents that reveal the deliberative processes of the Commission and its staff, documents subject to the official information privilege, and based on the facts of a particular case, documents where the public interest in nondisclosure clearly outweighs the public interest in disclosure.

III. ANALYSIS

The Charter provides that records of any Commission investigation "*shall* be considered confidential information to the extent permitted by State law." See S.F. Charter § C3.699-13 (emphasis added). The Charter further provides that "the unauthorized release of confidential information shall be sufficient grounds for the termination of the employee or removal of the commissioner responsible for such release." *Id.* The Commission's regulations implement these provisions of the Charter by providing that after a finding of probable cause, records of an investigation are not to be disclosed except as required by the California Public Records Act. S.F. Ethics Comm'n Regs. for Investigations and Enforcement Proceedings § XIII(B)(1).

Memorandum

TO: MEMBERS,
San Francisco Ethics Commission

DATE: June 27, 2005

PAGE: 2

RE: Public Records Issues Associated With The Investigation and Enforcement Process

We have previously advised you: (1) that under the California Public Records Act, public records must be disclosed unless an exemption applies; and (2) if an exemption applies to a record related to a Commission investigation, the Charter requires that the record remain confidential. A member of the Commission has inquired under what circumstances State law provides for an exemption for records related to an investigation.

It is infeasible to list all of the exemptions available under state law in this memorandum. (A copy of the California Public Records Act, which lists all of the exemptions available under State law, is available in the appendix of the City Attorney's Good Government Legal Guide.) We have listed below those exemptions that would most commonly be applied to records of a Commission investigation.

- Certain documents may be exempt from disclosure because the United States Constitution, the California Constitution or other federal or State laws prohibit their disclosure. For example, certain records are exempt from disclosure because they reveal confidential or personal information regarding individuals and such disclosure would constitute an unwarranted invasion of personal privacy or associational rights guaranteed by the First Amendment. *See* Cal. Gov't Code § 6254(k).
- Documents protected by the Attorney-Client privilege are exempt from disclosure. *See* Cal. Gov't Code § 6254(k).
- In some circumstances, documents that reveal the identity of persons complaining to the City about illegal acts are exempt from disclosure. *See* Cal. Gov't Code § 6254(k); Cal. Evidence Code § 1041.
- In some circumstances, documents that reveal the deliberative processes of the Ethics Commission or its staff are exempt from disclosure. *See* Cal. Gov't Code § 6255.
- Documents that reveal information gathered by the Commission under assurances of confidentiality (the official information privilege) are exempt from disclosure. *See* Cal. Gov't Code § 6254(k); Cal. Evidence Code § 1040.
- Documents where the public interest in nondisclosure clearly outweighs the public interest in disclosure are exempt from disclosure. *See* Cal. Gov't Code § 6255.

IV. CONCLUSION

The Commission may make public only those records of an investigation that are public records and for which no exemption can be claimed.