

Date: January 8, 2008

Item No. 16  
File No. 07089

## SUNSHINE ORDINANCE TASK FORCE

### AGENDA PACKET CONTENTS LIST\*

- Complaint by: Kimo Crossman v. DA**
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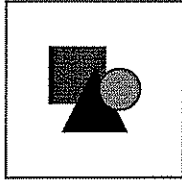
Completed by: Frank Darby

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.



DENNIS J. HERRERA  
City Attorney

ERNEST H. LLORENTE  
Deputy City Attorney

DIRECT DIAL: (415) 554-4236  
E-MAIL: ernest.llorente@sfgov.org

## MEMORANDUM

*December 27, 2007*

*KIMO CROSSMAN v. SAN FRANCISCO DISTRICT ATTORNEY'S OFFICE (07089)*

### COMPLAINT

#### THE COMPLAINANT ALLEGES THE FOLLOWING FACTS:

In October 2007, Kimo Crossman made an Immediate Disclosure Request by e-mail to the District Attorney's Office and Sandip Patel representing the DA's Office made a response. (The exact dates are not listed because the initial e-mails were not provided with the Complaint)

On October 10, 2007, Kimo Crossman sent an e-mail to Sandip Patel stating that the documents provided to date were insufficient. On October 16, 2007 and October 22, 2007, Kimo Crossman sent e-mails stating that we are awaiting a response.

#### COMPLAINANT FILES COMPLAINT

On November 6, 2007, Kimo Crossman filed a complaint against DA's Office alleging violations of the Sunshine Ordinance. Kimo Crossman stated that the e-mail records that all of the e-mails requested were not provided and the e-mails that were provided had illegal redactions.

#### RESPONDENT REPLIES

On December 11, 2007, Sandip Patel appeared on behalf of the D.A.'s Office before the Complaint Committee and stipulated to jurisdiction by the Task Force.

#### APPLICABLE STATUTORY SECTIONS:

1. California Constitution, Article I, Section 3 that states the general principals of public records and public meetings.
2. Sunshine Ordinance Section 67.1 that addresses Findings and Purpose.
3. Sunshine Ordinance, San Francisco Administrative Code Section 67.21 addresses general requests for public documents including records in electronic format.

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4. Sunshine Ordinance, San Francisco Administrative Code Section. 67.26 deals with withholding kept to a minimum.
5. Sunshine Ordinance, San Francisco Administrative Code Section. 67.27 deals with justification for withholding.
6. Sunshine Ordinance § 67.34 deals with willful failure to comply with the requirements of the Sunshine Ordinance and the comparable state statutes to be Official Misconduct.
7. California Public Records Act, Government Code Section 6253 deals with public records open to inspection, agency duties, and time limits.
8. California Public Records Act, Government Code Section 6255 deals with justification for withholding of records.

**APPLICABLE CASE LAW:**

none

**ISSUES TO BE DETERMINED**

**1. FACTUAL ISSUES**

**A. Uncontested Facts:**

The parties agree to the following facts:

- Crossman submitted a request for certain e-mails from the District Attorney's Office.

**B. Contested facts/ Facts in dispute:**

The Task Force must determine what facts are true.

**i. Relevant facts in dispute:**

Whether the District Attorney's Office complied with the public records request.

**2. QUESTIONS THAT MIGHT ASSIST IN DETERMINING FACTS:**

- a.) none.

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**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

**CALIFORNIA STATE CONSTITUTION, ARTICLE I, SECTION 1**

## §1 Inalienable rights

All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.

**THE CALIFORNIA CONSTITUTION AS AMENDED BY PROPOSITION 59 IN 2004  
ARTICLE I, SECTION 3**

## §3 Openness in Government

- a) The people have the right to instruct their representative, petition government for redress of grievances, and assemble freely to consult for the common good.
- b)(1) The people have the right of access to information concerning the conduct of the people's business, and therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny.
- 2) A statute, court rule, or other authority, including those in effect on the effective date of this subdivision that limits the right of access shall be adopted with findings demonstrating the interest protected by the limitation and the need for protecting that interest.
- 3) Nothing in this subdivision supersedes or modifies the right of privacy guaranteed by Section 1 or affects the construction of any statute, court rule, or other authority to the extent that it protects that right to privacy, including any statutory procedures governing discovery or disclosure of information concerning the official performance or professional qualifications of a peace officer.
- 4) Nothing in this subdivision supersedes or modifies any provision of this Constitution, including the guarantees that person may not be deprived of life, liberty, or property without due process of law, or denied equal protection of the laws, as provided by Section 7.
- 5) This subdivision does not repeal or nullify, expressly or by implication, any constitutional or statutory exception to the right of access to public records or meetings or public bodies that is in effect on the effective date of this subdivision, including, but not limited to, any statute protecting the confidentiality of law enforcement and prosecution records.
- 6) Nothing in this subdivision repeals, nullifies, supersedes, or modifies protections for the confidentiality of proceedings and records of the Legislature, the Members of the

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Legislature, and its employees, committee, and caucuses provided by Section 7 of Article IV, state law, or legislative rules adopted in furtherance of those provisions: nor does it affect the scope of permitted discovery in judicial or administrative proceedings regarding deliberations of the Legislature, the Members of the Legislature, and its employees, committees, and caucuses.

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

Section 67.1 addresses Findings and Purpose

The Board of Supervisors and the People of the City and County of San Francisco find and declare:

- (a) Government's duty is to serve the public, reaching its decisions in full view of the public.
- (b) Elected officials, commissions, boards, councils and other agencies of the City and County exist to conduct the people's business. The people do not cede to these entities the right to decide what the people should know about the operations of local government.
- (c) Although California has a long tradition of laws designed to protect the public's access to the workings of government, every generation of governmental leaders includes officials who feel more comfortable conducting public business away from the scrutiny of those who elect and employ them. New approaches to government constantly offer public officials additional ways to hide the making of public policy from the public. As government evolves, so must the laws designed to ensure that the process remains visible.
- (d) The right of the people to know what their government and those acting on behalf of their government are doing is fundamental to democracy, and with very few exceptions, that right supersedes any other policy interest government officials may use to prevent public access to information. Only in rare and unusual circumstances does the public benefit from allowing the business of government to be conducted in secret, and those circumstances should be carefully and narrowly defined to prevent public officials from abusing their authority.
- (e) Public officials who attempt to conduct the public's business in secret should be held accountable for their actions. Only a strong Open Government and Sunshine Ordinance, enforced by a strong Sunshine Ordinance Task Force can protect the public's interest in open government.

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(f) The people of San Francisco enact these amendments to assure that the people of the City remain in control of the government they have created.

(g) Private entities and individuals and employees and officials of the City and County of San Francisco have rights to privacy that must be respected. However, when a person or entity is before a policy body or passive meeting body, that person, and the public, has the right to an open and public process.

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.

...

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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.

l.) 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 t 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 67.26 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. 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.



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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 67.34 addresses willful failure as official misconduct.

The willful failure of any elected official, department head, or other managerial city employee to discharge any duties imposed by the Sunshine Ordinance, the Brown Act or the Public Records Act shall be deemed official misconduct. Complaints involving allegations of willful violations of this ordinance, the Brown Act or the Public Records Act by elected officials or department heads of the City and County of San Francisco shall be handled by the Ethics Commission.

Sunshine Ordinance Section 67.1 provides:

g) Private entities and individuals and employees and officials of the City and County of San Francisco have rights to privacy that must be respected. However, when a person or entity is before a policy body or passive meeting body, that person, and the public has the right to an open and public process.

**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.

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

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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 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.



kimo <kimo@webnetic.net>  
Sent by:  
kimocrossman@gmail.com

12/27/2007 08:37 PM

Please respond to  
kimo@webnetic.net

To SOTF <sotf@sfgov.org>

cc "Sandip Patel" <sandip.patel@sfgov.org>, "Paul Henderson"  
<Paul.Henderson@sfgov.org>, "District Attorney"  
<districtattorney@sfgov.org>, "Allen Grossman"

bcc

Subject Re: Sunshine Complaint Received: #07089\_Kimo Crossman  
vs District Attorney

SOTF

I wish to narrow this complaint as follows:

Section(s)\_Violated: 67.1, 67.25 d, 67.27,67.26, 67.21(a),(b),(i), (k),  
,67.34, Government Code 6253(a), 6253(c), 6253(d),  
6255(a),Constitution Article 1, Section 3

Description: Invalid redactions (Redaced email addresses of people corresponding on public record matters), Records not provided (refused to provide email communications on public record issues between City Attorney and DA), Timeline not met, invalid exemption for Attorney Client communications.

Because of this list of violations, the DA who should be well versed in the law apparently continues to ignore following many aspects of the Sunshine Ordinance, therefore I request that Kamala Harris, Sandip Patel and Paul Henderson be found in Willful Failure and referred to the AG, Ethics Commission, Board of Supervisors and an out of county DA - San Jose for Official Misconduct.



DENNIS J. HERRERA  
City Attorney

ERNEST H. LLORENTE  
Deputy City Attorney

DIRECT DIAL: (415) 554-4236  
E-MAIL: ernest.llorente@sfgov.org

December 3, 2007

Sue Cauthen, Chair  
Members of the Complaint Committee

Re: Kimo Crossman v. District Attorney's Office (07089)

Dear Chair Cauthen and Members of the Complaint Committee:

This letter addresses the issue of whether the Sunshine Ordinance Task Force ("Task Force") has jurisdiction over the complaint of Kimo Crossman against the San Francisco District Attorney's Office.

### BACKGROUND

In October 2007, Kimo Crossman made an Immediate Disclosure Request by e-mail to the District Attorney's Office and Sandip Patel representing the DA's Office made a response. (The exact dates are not listed because the initial e-mails were not provided with the Complaint)

On October 10, 2007, Kimo Crossman sent an e-mail to Sandip Patel stating that the documents provided to date were insufficient. On October 16, 2007 and October 22, 2007, Kimo Crossman sent e-mails stating that we are awaiting a response.

### COMPLAINT

On November 6, 2007, Kimo Crossman filed a complaint against DA's Office alleging violations of the Sunshine Ordinance.

### SHORT ANSWER

Based on Complainant's allegation and the applicable sections of the Sunshine Ordinance and the California Public Records Act, which are cited below, the Sunshine Ordinance Task Force *does* have jurisdiction over the allegation. The allegations are covered under 67.21 and 67.25 of the Ordinance.

### DISCUSSION AND ANALYSIS

Article I Section 3 of the California Constitution as amended by Proposition 59 in 2004, the State Public Records Act, the State Brown Act, and the Sunshine Ordinance as amended by Proposition G in 1999 generally covers the area of Public Records and Public Meeting laws that the Sunshine Ordinance Task Force uses in its work.

Letter to the Complaint Committee

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December 3, 2007

The Sunshine Ordinance is located in the San Francisco Administrative Code Chapter 67. All statutory references, unless stated otherwise, are to the Administrative Code.

Section 67.1 covers findings and purpose of the Ordinance. Section 67.21 governs the release of public documents. Section 67.25 governs the release of public documents after an Immediate Disclosure Request. Section 67.4 covers passive meetings. Section 67.27 covers justification for withholding. Section 67.26 states that withholding of public records be kept to a minimum. Section 67.29-7 deals with Department Head's obligation to maintain records in a professional and businesslike manner. Section 67.34 states that willful failure shall be official misconduct.

State Government Code Section 6253 deals with the release of public records, and Section 6255 covers justification for withholding of records.

In this case Kimo Crossman's allegations puts the case under the jurisdiction of the Task Force and the Task Force will have to determine if the DA's Office violated the Ordinance and/or the CPRA and if so what specific sections.



<complaints@sfgov.org>

11/14/2007 12:12 PM

To <soff@sfgov.org>

cc

bcc

Subject Sunshine Complaint

Submitted on: 11/14/2007 12:12:32 PM

Department: District Attorney

Contacted: Sandip Patel, Paul Henderson, Kamala Harris

Public\_Records\_Violation: Yes

Public\_Meeting\_Violation: No

Meeting\_Date:

Section(s)\_Violated: 67.1, 67.25 d, 67.27, 67.26, 67.21(a), (b), (i), (k), (l), 67.21-1, 67.29-7(a), 67.34, Government Code 6253(a), 6253(c), 6253(d), 6255(a), Constitution Article 1, Section 3

Description: Records not kept in a business-like fashion, versions provided were unusable, Originals not provided, invalid redactions, Records not provided, Timeline not met, invalid exemption for Attorney Client communications.

Because of this list of violations, the DA who should be well versed in the law apparently continues to ignore following many aspects of the Sunshine Ordinance, therefore I request that Kamala Harris, Sandip Patel and Paul Henderson be found in Willful Failure and referred to the AG, Ethics Commission, Board of Supervisors and an out of county DA - San Jose for Official Misconduct.

Please see attached email for more details.

Hearing: Yes

Date: November 6, 2007

Name: Kimo Crossman

Address:

City:

Zip:

Phone:

Email: Kimo@webnetic.net

Anonymous:

-----  
---  
User Data

Client IP (REMOTE\_ADDR) : 172.31.2.78  
Client IP via Proxy (HTTP\_X\_FORWARDED\_FOR) :



"Kimo Crossman"  
 <kimo@webnetic.net>  
 11/05/2007 07:40 PM

"SOTF" <soft@sfgov.org>, "Paul Henderson"  
 To <Paul.Henderson@sfgov.org>, "SFDA  
 PublicRecordsRequest"  
 "Allen Grossman" <grossman356@mac.com>,  
 cc <home@prosf.org>, "Wayne Lanier"  
 <w\_lanier@pacbell.net>, "Ben Rosenfeld"  
 bcc  
 Subject Filing complaint with Sunshine Task Force - District Attorney

Submitted on: 11/6/2007

Dept: District Attorney

contacted: Sandip Patel, Paul Henderson, Kamala Harris

violation:

section: 67.1, 67.25 d, 67.27,  
 67.26,

67.21 (a) (b) (i) (k) (l)

67.21-1

67.29-7 (a)

67.34

Government Code 6253 (a), 6253 (c), 6253 (d), 6255 (a),

Constitution Article 1, Section 3

description:

Records not kept in a business-like fashion, versions provided were unusable, Originals not provided, invalid redactions, Records not provided, Timeline not met, invalid exemption for Attorney Client communications.

Because this the DA who should be well versed in the law continues to ignore many aspects of the Sunshine Ordinance, I request that Kamala Harris, Sandip Patel and Paul Henderson be found in Willful Failure and referred to the AG, Ethics Commission, Board of Supervisors and an out of county DA - San Jose for Official Misconduct.

Please see attached email for more details

hearing\_yes: Yes

name: Kimo Crossman

address:

city:

zip:

date:

phone:

email: kimo@webnetic.net

anonymous:

----- Message from "Kimo Crossman" <kimo@webnetic.net> on Mon, 29 Oct 2007 17:14:15 -0800 -----

To: "'SFDA PublicRecordsRequest'" <sfda.publicrecordsrequest@sfgov.org>  
<Sandip\_Patel@sfgov.org>, "'Allen Grossman'" <grossman356@mac.com>, "'Wayne  
cc: Lanier'" <w\_lanier@pacbell.net>, <home@prosf.org>, "'Paul Henderson'"  
<Paul.Henderson@sfgov.org>

**Subj** RE: immediate disclosure request  
**ect:**

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

From: Kimo Crossman [mailto:kimo@webnetic.net]  
Sent: Monday, October 22, 2007 6:58 PM  
To: 'SFDA PublicRecordsRequest'  
Cc: 'Sandip\_Patel@sfgov.org'; 'Allen Grossman'; 'Wayne Lanier'; 'home@prosf.org'; 'Paul Henderson'  
Subject: RE: immediate disclosure request

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

From: Kimo Crossman [mailto:kimo@webnetic.net]  
Sent: Tuesday, October 16, 2007 10:40 PM  
To: 'SFDA PublicRecordsRequest'  
Cc: 'Sandip\_Patel@sfgov.org'; 'Allen Grossman'; 'Wayne Lanier'; 'home@prosf.org'; 'Paul Henderson'  
Subject: RE: immediate disclosure request

We await a response

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

From: Kimo Crossman [mailto:kimo@webnetic.net]  
Sent: Wednesday, October 10, 2007 11:51 PM  
To: 'SFDA PublicRecordsRequest'  
Cc: 'Sandip\_Patel@sfgov.org'; 'Allen Grossman'; 'Wayne Lanier'; 'home@prosf.org'; 'Paul Henderson'  
Subject: RE: immediate disclosure request

Additional feedback

It appears not only are you redacting email addresses without footnoting the exemption but also even names of people like Christian Holmer, Allen Grossman and Wayne Lanier. Even the names of public SOTF members (like an SOTF Agenda) have been redacted from the documents. Also names of journalists who have corresponded with Matt Dorsey have been redacted. So even though the City Attorney's office didn't redact these names, the DA is.

Also the PDF's are not searchable or ADA compliant for screen readers and they have been scanned at a high resolution level unneeded which has caused the PDF's to be in the size range of 5 to 10 megabytes which often break email systems. Please provide the original email documents which are text searchable, ada compliant. And send documents in 3mb or less chunks.

It appears that email communications with the city attorney related to sunshine requests have not been provided or have been completely redacted with no footnoted exemption. As previously shown under 67.21i there is no protected relationship for these documents.

The Sunshine 6.pdf you have sent me has scrambled text making the email unreadable and you have redacted names and email addressed without footnoting them with legal exemptions as required under sunshine.

Please provide the original emails.



Thank you.

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

From: Sandip Patel [[mailto:Sandip\\_Patel@SFGOV.sfgov.org](mailto:Sandip_Patel@SFGOV.sfgov.org)] On Behalf Of SFDA PublicRecordsRequest

Sent: Wednesday, October 10, 2007 3:44 PM

To: Kimo Crossman

Subject: RE: immediate disclosure request

October 10, 2007

Kimo Crossman  
[kimo@webnetic.net](mailto:kimo@webnetic.net)

Re: Multiple Sunshine Requests

Dear Mr. Kimo Crossman,

Attached are additional Sunshine related emails.

Sincerely,

Sandip Patel

(See attached file: Sunshine 3.pdf)