

Date: Jan. 25, 2011

Item No. 10 & 11
File No. 10068

SUNSHINE ORDINANCE TASK FORCE

AGENDA PACKET CONTENTS LIST*

- Nick Pasquariello v SF Municipal Transportation Agency
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Completed by: Chris Rustom

Date: Jan. 21, 2011

***This list reflects the explanatory documents provided**

~ Late Agenda Items (documents received too late for distribution to the Task Force Members)

** The document this form replaces exceeds 25 pages and will therefore not be copied for the packet. The original document is in the file kept by the Administrator, and may be viewed in its entirety by the Task Force, or any member of the public upon request at City Hall, Room 244.



DENNIS J. HERRERA
City Attorney

JERRY THREET
Deputy City Attorney

Direct Dial: (415) 554-3914
Email: jerry.threet@sfgov.org

**MEMORANDUM
PRIVILEGED AND CONFIDENTIAL**

TO: Sunshine Ordinance Task Force
FROM: Jerry Threet
Deputy City Attorney
DATE: January 17, 2011
RE: Nick Pasquariello v. Metropolitan Transportation Agency (10068)

COMPLAINT

THE COMPLAINANT ALLEGES THE FOLLOWING:

Complainant Nick Pasquariello ("Complainant") alleges that on November 17, 2010 he made an Immediate Disclosure Request ("IDR") to the Metropolitan Transportation Agency ("MTA") requesting exact copies, including metadata, to be mailed to him on a CD, of "all emails, correspondence, contracts, invoices, memos, and records or payment disbursements MTA has send [sic] or received for the CLIPPER program for the period January 1, 2009 up to and including November 17, 2010." He further alleges that, as of his complaint on November 22, 2010, he had not received any response to his request.

COMPLAINANT FILES COMPLAINT:

On November 22, 2010, Complainant filed this complaint against MTA.

JURISDICTION:

MTA is a City department subject to the provisions of the Sunshine Ordinance. The Department does not contest jurisdiction.

APPLICABLE STATUTORY SECTION(S):

- Section 67.21 governs the process for gaining access to public records.
- Section 67.25 governs the immediacy of response.
- Section 67.26 governs the withholding of records.
- Section 67.27 governs the written justifications for withholding of records.

APPLICABLE CASE LAW:

- *Bruce v. Gregory* (1967) 65 Cal.2d 666, at 676 [California Supreme Court]: "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."

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- *Rosenthal v. Hansen* (1973) 34 Cal.App.3d 754, 761 [extending Bruce v. Gregory's rule of reason to public records requests under the California Public Records Act; see also 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].
- *Western Select Securities, Inc. v. Murphy, et al.*, S.F. Superior Court No. 315310, Slip Op. at 5-6 (stamped August 24, 2000, issued December 1, 2000) [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 ruled that the same rule of reason applied to both]. The order was 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 rule that the Sunshine Ordinance includes an implied or inherent rule of reason.

ISSUES TO BE DETERMINED

Uncontested Facts: Complainant alleges that he made an IDR to MTA on November 17, 2010, requesting exact copies, including metadata, to be mailed to him on a CD, of "all emails, correspondence, contracts, invoices, memos, and records or payment disbursements MTA has send [sic] or received for the CLIPPER program for the period January 1, 2009 up to and including November 17, 2010." Respondent does not contest these allegations.

Contested Facts: Complainant further alleges that, as of November 22, 2010, he had not received any response to his request.

Respondent responds that on November 18, 2010, it sent complainant a letter responding to his request by invoking a 14-day extension of time, until December 2, 2010, to respond to his request, as allowed by the Ordinance. MTA further alleges that the November 18, 2010 letter also requested that complainant contact MTA to provide clarification as to his request, and that they also telephoned complainant seeking clarification several times more between that date and December 2, 2010.

The MTA further alleges that on December 2, 2010, it sent another letter and documents responsive to the IDR on a CD to complainant, in response to the IDR. This letter informed complainant that MTA continued to search for additional responsive documents beyond those provided, and again asked for clarification of the request. The December 2, 2010 letter refused to provide metadata in response to the IDR, referring the complainant to the September 19, 2006 memorandum by the City Attorney on this issue.¹ The letter also invoked the attorney-client and work product privileges for withholding documents.

¹ That memo provided a number of legal justifications for a department's refusal to provide metadata, including the "rule of reason." *Bruce v. Gregory* (1967) 65 Cal.2d 666; *Rosenthal v. Hansen* (1973) 34 Cal.App.3d 754, 761

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QUESTIONS THAT MIGHT ASSIST IN DETERMINING FACTS:

- How many records have been provided in response to the IDR?
- What is the volume of records the MTA needs to inspect in order to respond fully to this request?
- Are the records requested readily available?
- Is there a need for the MTA to assign staff to oversee an inspection of requested records?
- Is the MTA actively using the requested records?
- What other public records requests has the MTA been responding to during the period in question?
- Would responding promptly to the request cause significant disruption of the MTA's operations?
- Has the MTA afforded the requester access to records for a specified amount of time each day?
- Would full and immediate compliance with the request pose serious or insurmountable staffing burdens for the MTA?
- Has the MTA allocated a number of hours per day or week to work on responding to the request?
- Has the MTA sought to work cooperatively with the requester to determine if the request can be narrowed to minimize barriers to a prompt response, or to at least prioritize records the request would like to first retrieve and review first?
- Has the MTA allocated a specific number of hours per day or week to responding to the complainant's requests?
- How would reviewing the metadata associated with the above documents affect the answers to the above questions?

LEGAL ISSUES/LEGAL DETERMINATIONS:

- Has the MTA timely responded to the IDR?
- Did the MTA justify withholding in accordance with the requirements of the Ordinance?
- Are the MTA's justifications for withholding reasons allowed by the Ordinance?
- Does the nature of the request justify a 14 day extension?
- Does the "rule of reason" apply to the requirements of the Sunshine Ordinance?
- Assuming that the "rule of reason" applies to the Sunshine Ordinance, does the MTA's response conform to that "rule of reason"?

CONCLUSION

THE TASK FORCE FINDS THE FOLLOWING FACTS TO BE TRUE:

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

**CHAPTER 67, SAN FRANCISCO ADMINISTRATIVE CODE (SUNSHINE
ORDINANCE)**

**SEC. 67.21. PROCESS FOR GAINING ACCESS TO PUBLIC RECORDS;
ADMINISTRATIVE APPEALS.**

(b) A custodian of a public record shall, as soon as possible and within ten days 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.

SEC. 67.25. IMMEDIACY OF RESPONSE.

(a) Notwithstanding the 10-day period for response to a request permitted in Government Code Section 6256 and in this Article, a written request for information described in any category of non-exempt public information shall be satisfied no later than the close of business on the day following the day of the request. This deadline shall apply only if the words "Immediate Disclosure Request" are placed across the top of the request and on the envelope, subject line, or cover sheet in which the request is transmitted. Maximum deadlines provided in this article are appropriate for more extensive or demanding requests, but shall not be used to delay fulfilling a simple, routine or otherwise readily answerable request.

(b) If the voluminous nature of the information requested, its location in a remote storage facility or the need to consult with another interested department warrants an extension of 10 days as provided in Government Code Section 6456.1, the requester shall be notified as required by the close of business on the business day following the request.

(c) The person seeking the information need not state his or her reason for making the request or the use to which the information will be put, and requesters shall not be routinely asked to make such a disclosure. Where a record being requested contains information most of which is exempt from disclosure under the California Public Records Act and this article, however, the City Attorney or custodian of the record may inform the requester of the nature and extent of the non-exempt information and inquire as to the requester's purpose for seeking it, in order to suggest alternative sources for the information which may involve less redaction or to otherwise prepare a response to the request.

(d) Notwithstanding any provisions of California Law or this ordinance, in response to a request for information describing any category of non-exempt public information, when so requested, the City and County shall produce any and all responsive public records as soon as reasonably possible on an incremental or "rolling" basis such that responsive records are produced as soon

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as possible by the end of the same business day that they are reviewed and collected. This section is intended to prohibit the withholding of public records that are responsive to a records request until all potentially responsive documents have been reviewed and collected. Failure to comply with this provision is a violation of this article.

SEC. 67.26. WITHHOLDING KEPT TO A MINIMUM.

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.

SEC. 67.27. JUSTIFICATION OF WITHHOLDING.

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 or 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.

CAL. PUBLIC RECORDS ACT (GOVT. CODE §§ 6250, ET SEQ.)

SECTION 6253

- (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 therefor. In unusual circumstances, the time limit prescribed in this section may be extended by written notice by the head of the agency or his or her designee to the person making the request, setting forth the reasons for the extension and the date on which a determination is expected to be dispatched. No notice shall specify a date that would result in an extension for more than 14 days. When the agency dispatches the determination, and if the agency determines that the request seeks disclosable public records, the agency shall state the estimated date and time when the records will be made available. As used in this section,

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“unusual circumstances” means the following, but only to the extent reasonably necessary to the proper processing of the particular request:

- (1) The need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request.
- (2) The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records that are demanded in a single request.
- (3) The need for consultation, which shall be conducted with all practicable speed, with another agency having substantial interest in the determination of the request or among two or more components of the agency having substantial subject matter interest therein.
- (4) The need to compile data, to write programming language or a computer program, or to construct a computer report to extract data.

(d) Nothing in this chapter shall be construed to permit an agency to delay or obstruct the inspection or copying of public records. The notification of denial of any request for records required by Section 6255 shall set forth the names and titles or positions of each person responsible for the denial.

SECTION 6254

(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 record 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 therefor. In unusual circumstances, the time limit prescribed in this section may be extended by written notice by the head of the agency or his or her designee to the person making the request, setting forth the reasons for the extension and the date on which a determination is expected to be dispatched. No notice shall specify a date that would result in an extension for more than 14 days. When the agency dispatches the determination, and if the agency determines that the request seeks disclosable public records, the agency shall state the estimated date and time when the records will be made available. As used in this section, “unusual circumstances” means the following, but only to the extent reasonably necessary to the proper processing of the particular request:

- (1) The need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request.
- (2) The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records that are demanded in a single request.
- (3) The need for consultation, which shall be conducted with all practicable speed, with another agency having substantial interest in the determination of the request or among two or more components of the agency having substantial subject matter interest therein.

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TO: Sunshine Ordinance Task Force
DATE: January 17, 2011
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(4) The need to compile data, to write programming language or a computer program, or to construct a computer report to extract data.

confidential
fax

To: Mr. Chris Rustom, Clerk, SOTF
Fax Number: 554 5163

From:
Fax Number:
Business Phone:
Home Phone:

Pages: 2
Date/Time: 11/22/2010 4:48:39 PM
Subject: Complaint against SFMTA

Dear Mr. Rustom,
Attached please find a copy of an Immediate Disclosure Request I made of the SFMTA on November 17, 2010. To date I have not received any response to this request. Please schedule a hearing before SOTF to hear this complaint.
I appreciate your help.
Nick Pasquariello
(415) 431-2990

IMMEDIATE DISCLOSURE REQUEST

(SECOND AMENDED REQUEST)

Post Office Box 42791
San Francisco, California 94142
(415) 431-2990

November 17, 2010

Mr. Nathaniel Ford
Executive Director
Metropolitan Transportation Authority
(MTA)
1 South Van Ness Avenue
San Francisco, California 94103
(415) 701-4720
(415) 701-4502 FAX

Dear Mr. Ford, Re: CLIPPER

Would please send me exact copies of the following original documents including metadata which supports searchable queries

all emails, correspondence, contracts, invoices, memos, and records of payment disbursements MTA has send or received for the CLIPPER program for the period January 1, 2009 up to an including November 17, 2010.

You may mail these **documents on a CD** to the above address.

Your prompt response to this request is much appreciated.

Yours truly,

Nick Pasquariello

Gavin Newsom | Mayor

Tom Nolan | Chairman

Jerry Lee | Vice-Chairman

Cameron Beach | Director

Cheryl Brinkman | Director

Malcolm Heinicka | Director

Bruce Oka | Director

Nathaniel P. Ford Sr. | Executive Director/CEO

December 9, 2010

Mr. Rick Knee
Chairman, Sunshine Ordinance Task Force
City Hall, Room 244
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102

Re: Complaint against the Municipal Transportation Agency
Complaint No. 10068

Dear Mr. Knee:

I am writing in response to complaint #10068 filed by Mr. Nick Pasquariello on November 22, 2010. His complaint states:

“Attached please find a copy of an Immediate Disclosure Request I made of the SFMTA on November 17, 2010. To date I have not received any response to this request. Please schedule a hearing before SOTF to hear this complaint.”

On November 17, 2010, Mr. Pasquariello submitted an Immediate Disclosure request for “RE: Clipper. The following original documents including metadata which supports searchable queries: All emails, correspondence, contracts, invoices, memos, and records of payment disbursements MTA has sent or received for the CLIPPER program for the period January 1, 2009 up to an including November 17, 2010.”

RESPONSE: On November 18, 2010, the SFMTA sent Mr. Pasquariello a letter, via USPS, invoking a 14 day extension – until December 2, 2010 - to respond to his request per Cal. Gov.t. Code 6253(c)(2) and (3). Attached please find a copy of the SFMTA’s letter to Mr. Pasquariello.

On December 2, 2010, the SFMTA sent Mr. Pasquariello a letter and documents responsive to his request. These were placed on a compact disc per his request. Attached please find a copy of the SFMTA’s letter to Mr. Pasquariello.

The November 18, 2010, letter to Mr. Pasquariello also asked him to contact the SFMTA to provide clarification of his request. Additionally, I phoned Mr. Pasquariello numerous times between November 18, 2010 and December 2, 2010 seeking clarification and was unable to

reach him. However, per the December 2, 2010 letter, we did provide some responsive documents and informed him that we are continuing to search for documents. We again asked him to contact us to provide clarification of his request.

Sincerely,


Caroline Celaya

cc: Nick Pasquariello

Gavin Newsom | Mayor

Tom Nolan | Chairman

Jerry Lee | Vice-Chairman

Cameron Beach | Director

Cheryl Brinkman | Director

Malcolm Heinicke | Director

Bruce Oka | Director

Nathaniel P. Ford Sr. | Executive Director/CEO

November 18, 2010

SENT VIA USPSNick Pasquariello
Post Office Box 42791
San Francisco, CA 94142

RE: Public Records Request dated November 17, 2010

Dear Mr. Pasquariello:

On behalf of the San Francisco Municipal Transportation Agency (the "SFMTA"), this letter responds to your public records request dated November 17, 2010.

The Records Requested

You have requested a copy of:

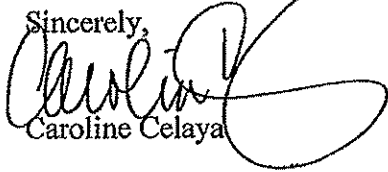
"RE: Clipper. The following original documents including metadata which supports searchable queries: All emails, correspondence, contracts, invoices, memos, and records of payment disbursements MTA has sent or received for the CLIPPER program for the period January 1, 2009 up to an including November 17, 2010."

Please be advised we are hereby invoking an extension of an additional fourteen (14) calendar days from November 18, 2010, to respond to the remainder of your request.

Under the California Public Records Act and the San Francisco Sunshine Ordinance, the deadline can be extended for an additional fourteen days due to "the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records that are demanded in a single request," and "the need for consultation, which shall be conducted with all practicable speed, with another agency having substantial interest in the determination of the request or among two or more components of the agency having substantial subject matter interest therein." Cal. Gov't Code §6253(c)(2), and (3). The SFMTA is invoking the extension on these grounds because staff must (1) collect and examine a voluminous amount of material, and (2) consult with another City agency having substantial subject matter interest in the request. We will endeavor to respond to your request as soon as possible, but not later than December 2, 2010.

As stated above, the request is voluminous and we would like to discuss your request with you so that we may be more clear about what exactly you are requesting. Please contact the undersigned at the Sunshine Request line at 415-701-4670 or at sfntasunshinerequests@sfmta.com at your earliest convenience.

Sincerely,



Caroline Celaya

Gavin Newsom | Mayor

Tom Nolan | Chairman

Jerry Lee | Vice-Chairman

Cameron Beach | Director

Cheryl Brinkman | Director

Malcolm Heinicke | Director

Bruce Oka | Director

Nathaniel P. Ford Sr. | Executive Director/CEO

December 2, 2010

SENT VIA USPS

Nick Pasquariello
Post Office Box 42791
San Francisco, CA 94142

RE: Immediate Disclosure Request dated November 17, 2010

Dear Mr. Pasquariello:

On behalf of the San Francisco Municipal Transportation Agency (the "SFMTA"), this letter responds to your immediate disclosure request dated November 17, 2010. On November 18, 2010, the SFMTA invoked an extension of up to an additional 14 days – until December 2, 2010, to respond to your request.

The Records Requested

You have requested a copy of:

“RE: CLIPPER, the following original documents including metadata which supports searchable queries: all emails, correspondence, contracts, invoices, memos and records of payment disbursements MTA has send or received for the CLIPPER Program for the period January 1, 2009 up to an including November 17, 2010.”

Exemptions and Privileges

You have asked for the records in a format that includes metadata. As explained in the memorandum from the City Attorney's Office to the Sunshine Ordinance Task Force dated September 19, 2006 (a copy of which is included on the enclosed CD), City departments are not required to furnish metadata that is embedded in an electronic record such as a Word document. Therefore, we respectfully decline your request. The memorandum can also be found using the following link:

<http://www.sfcityattorney.org/Modules/ShowDocument.aspx?documentid=105>.

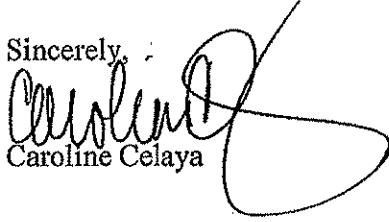
We will also withhold any documents that may be protected by the attorney-client or work product privileges.

Document Production

Attached please find documents responsive to your request. The agency is continuing to search for additional responsive documents and will provide those documents to you on a rolling basis. S.F. Admin. Code §67.25(d). Please note, as mentioned in voice mail messages to you at (415) 431-2990, your request is extremely voluminous and staff has sought clarification of it. We have interpreted the request as seeking contracts and other documents relative to payment disbursements sent or received by the SFMTA for the Clipper program. If you are seeking other information regarding the Clipper program, please state, with more specificity, the nature of the documents that you would like released.

Please contact the Sunshine request line at (415) 701-4670, via fax at (415) 701-4502 or at sfntasunshinerequests@sfmta.com if you have any further questions regarding this matter or if you would like additional information.

Sincerely,


Caroline Celaya