Date: March 23, 2009

Item No. 5
File No. 09075

SUNSHINE ORDINANCE TASK FORCE

AGENDA PACKET CONTENTS LIST*

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Completed by: Chris Rustom **Date:** March 18, 2010

***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
February 25, 2010

DATE THE DECISION ISSUED
January 26, 2010

BRED STARR v. CITY ATTORNEY'S OFFICE (09075)

FACTS OF THE CASE

Complainant, Bred Starr, alleges that her Sunshine request for documents from the City Attorney's Office (CAO) and the Municipal Transportation Authority (MTA) related to Mary Ellen O'Brien from the Department of Parking and Traffic and Geraldine Rosen Parks in August 2009 was ignored. She also alleges that her telephone and in-person requests were acknowledged and then ignored, and was advised there would not be full disclosure.

COMPLAINT FILED

On October 16, 2009, Bred Starr filed a Sunshine Ordinance Complaint against the CAO and the MTA for unspecified violations of the Sunshine Ordinance.

HEARING ON THE COMPLAINT

On January 26, 2010, Complainant Bred Starr presented her claim before the Task Force. Virginia Dario Elizondo of the City Attorney's Office presented the Respondent's defense.

Ms. Starr told the Task Force that she had asked for documents regarding the investigation of Mary Ellen O'Brien of the Department of Parking and Traffic in 2004. The investigation, she said, was done on behalf of the City and not on behalf of the taxpayers and that made access to documents difficult. She wanted to know why Ms. O'Brien is still a City employee and what was said during the investigation. She said she received only four pages about the case from the CAO whereas a news article in the San Francisco *Chronicle* referred to a 16-page investigative memo about the matter.

Ms. Elizondo said the Sunshine request was for an internal investigative memo drafted by the CAO for its client, the MTA, which apparently had been leaked to the press. She stated further that the memo was confidential under state law because it was protected by both the attorney work product doctrine and the attorney-client privilege. In addition, two disciplinary letters sent to the subject of the investigation which were responsive to the request were

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provided to the complainant by the CAO, she said. Just because a document or portions of it are leaked to the press does not make it a public document, she added, as the confidentiality may be waived only by a City official with authority to make such a waiver.

Ms. Elizondo further noted that, in the absence of evidence that an authorized public official waived the privileges, the CAO still had an ethical and legal duty to maintain the privilege under state law. Therefore, the CAO could not release the documents. Ms. Elizondo further noted that the Sunshine Ordinance contains specific exemptions to disclosure for documents covered under these two privileges.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Task Force noted that there is no case law exactly on point on this issue – whether or not records regarding an investigation into employee misconduct conducted by a city attorney are totally protected from release by the attorney-client privilege and/or work product doctrine. The Task Force did note that under existing California law, records of investigations into alleged employee misconduct must be released unless the allegations of misconduct are not substantial in nature. *See, .e.g., Bakersfield City School Dist. v. Superior Court* (2004) 118 Cal.App.4th 1041.

The Task Force also noted that where an investigation is primarily factual, the attorney-client privilege may not apply to records of the investigation, at least the portions of the records discussing the facts of the investigation. Finally, while the City in this case did release the two disciplinary letters that were issued to the employee in question, it may not always be the case that disciplinary letters are produced at the conclusion of an investigation into employee misconduct. Indeed, in cases where the City Attorney conducts the factual investigation into employee misconduct and no discipline is imposed, the only record of the investigation may well be the investigatory memorandum. In that scenario, under the City Attorney's position, *no* records regarding the alleged employee misconduct would be produced and the public would be left in the dark about serious, if unsustained, allegations of public employee misconduct.

Based on the testimony and evidence presented the Task Force finds that the factual background in the investigatory memorandum is critical for the public to see and understand, especially now that the investigation is complete, but that justifiable redactions may be made if any particular allegations were found to be insubstantial.

DECISION AND ORDER OF DETERMINATION

The Task Force finds that the agency violated Section(s) 67.21 and 67.24 for failure to produce responsive documents, specifically the 16-page memorandum regarding the employee's misconduct. The Respondent shall release the records requested within five business days of the issuance of this Order of Determination and appear before the Compliance and Amendments Committee on March 9, 2010.

ORDER OF DETERMINATION

The motion was adopted by the Sunshine Ordinance Task Force on January 26, 2010, by the following vote: (Craven-Green / Washburn)
Ayes: Manneh, Washburn, Johnson, Goldman, Williams, Cauthen, Craven-Green

The Task Force also found the agency in violation of Sec(s) 67.21 (b) for untimely response and 67.25 for failure to provide documents in a timely fashion (Cauthen / Williams)
Ayes: Cauthen, Manneh, Washburn, Johnson, Goldman, Williams
Noes: Craven-Green

Richard A. Knee, Chair
Sunshine Ordinance Task Force

c: Jerry Threet, Deputy City Attorney
Bred Starr, complaint
Virginia Dario Elizondo, respondent

CITY AND COUNTY OF SAN FRANCISCO

DENNIS J. HERRERA
City Attorney

OFFICE OF THE CITY ATTORNEY

VIRGINIA DARIO ELIZONDO
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March 9, 2010

Sunshine Ordinance Task Force
City Hall, Room 244
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102-4682

Re: Bred Starr v. City Attorney's Office (09075)

Dear Task Force Members:

The City Attorney's Office respectfully declines to release the confidential investigative memorandum that is the subject of the Order of Determination dated February 25, 2010, for the reasons set forth below.

The Task Force asserts that this matter should be resolved under the rationale set forth in two cases that weighed an employee's right to privacy against the public's interest in disclosure of documents under the California Public Records Act, Gov. Code §§6250, et seq. *See, Bakersfield City School District v. Superior Court* (2004) 118 Cal.App.4th 1041 (referenced at the Task Force hearing of January 26, 2010, and cited in the Order of Determination); *BRV, Inc. v. Superior Court* (2006) 143 Cal.App.4th 742 (referenced at the hearing). In *Bakersfield*, the court ordered disclosure of complaints filed against a public employee after determining that the public interest in disclosure outweighed the employee's right to privacy. *See, Bakersfield* at 1045–47. In *BRV*, the court similarly found that the public's interest in disclosure of complaints filed against a school superintendent outweighed the superintendent's privacy interest. *BRV* at 759.

But in neither case was the attorney-client privilege or the work-product doctrine raised as a basis for withholding the requested documents. The respective Courts of Appeal did not address those issues. It is axiomatic that cases do not stand for propositions not addressed therein. *People v. Alvarez* (2002) 27 Cal.4th 1161, 1176 (citing numerous cases). Thus, whatever the precedential import of *Bakersfield* and *BRV* in other contexts, those cases provide no authority for the disclosure of documents that the attorney-client or the attorney work product privilege protects from disclosure.

The California Public Records Act exempts from disclosure materials protected by the attorney-client privilege or the attorney work-product doctrine. Cal. Govt. Code § 6276.04 (cross-referencing in the Public Records Act, as justifications for withholding records, the attorney-client privilege and attorney work product doctrine); Cal. Govt. Code § 6254(k) (protecting from disclosure records "the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege"); Cal. Evidence Code § 954 (attorney-client privilege); Cal. Code. Civ. Pro. § 2018.030 (attorney work product doctrine); *see also Roberts v. City of Palmdale* 5 Cal. 4th 363, 374 (concluding that the California Public Records Act does not require disclosure of material that is protected under the attorney-client privilege). The Task Force improperly equates the balancing of an employee's privacy interest against the public interest in disclosure in a context that does not implicate the attorney-client or attorney work product privilege with, among other

things, an attorney's ethical obligation to "maintain inviolate the confidence . . . of his or her client." Business and Professions Code § 6068; *see also* CA Rule of Professional Conduct 3-100.

In short, while this office properly released the two employee disciplinary letters to Ms. Starr, it properly withheld the investigative report that the Task Force has now ordered it to disclose. The law does not permit the disclosure. Nothing in *Bakersfield* or *BRV* changes that basic proposition.

The Task Force further contends that the attorney-client privilege does not apply to the factual portions of the memorandum. But in *Mitchell v. Superior Court (Shell Oil Co.)* (1984) 37 Cal.3d 591, 601,the California Supreme Court ruled that it makes no difference whether the communications between the attorney and the client relate to "factual information" or to."legal advice"—the privilege still applies. More recently, the California Supreme Court considered whether a confidential attorney-client memorandum could be parsed of its factual and legal content, on the theory that the factual content was not covered by the privilege. The court emphatically rejected that theory: "[W]hen the communication is a confidential one between attorney and client, the entire communication, including its recitation or summary of factual material is privileged." *Costco Wholesale Corporation v. Superior Court,* (2009) 47 Cal. 4th 725, 736.[1]

Therefore, we find no legal authorization for the release of the requested confidential attorney-client memorandum or the portions therein discussing the facts of the investigation.

Very truly yours,

DENNIS J. HERRERA
City Attorney

VIRGINIA DARIO ELIZONDO
Deputy City Attorney

[1] In the past week, the California Court of Appeal for the Fifth District held that in certain circumstances witness statements, standing alone, are not necessarily covered by the attorney work product doctrine even if procured by an attorney or investigator working on an attorney's behalf . *Coito v. Superior Court of Stanilaus County,* 2010 WL 728571 (March 4, 2010). The issue arose in the context of pretrial discovery in a civil case. The decision did not address the attorney-client privilege. Insofar as it addressed attorney work product, it directly conflicts with at least one other California appellate decision and may be in conflict with others. We anticipate that the California Supreme Court will likely resolve this conflict among appellate court decisions.