

Date: March 23, 2009

Item No. 8 & 9  
File No. 10007

## SUNSHINE ORDINANCE TASK FORCE

### AGENDA PACKET CONTENTS LIST\*

- Supervisor Chris Daly v Mayor's Office**
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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.



DENNIS J. HERRERA  
City Attorney

JERRY THREET  
Deputy City Attorney

DIRECT DIAL: (415) 554-3914  
E-MAIL: jerry.threet@sfgov.org

**MEMORANDUM**

*March 16, 2010:*

*SUPERVISOR DALY VS. MAYOR'S OFFICE (10007)*

**COMPLAINT**

**THE COMPLAINANT ALLEGES THE FOLLOWING:**

Complainant, Supervisor Chris Daly, alleges that on February 4, 2010, he sent an Immediate Disclosure Request ("IDR") to the Mayor's Office ("Mayor") requesting "all written communication between Michael Yarne and the Planning Department, the Mayor's Office of Housing, and the Controller between October 1, 2009, and January 31, 2010." Daly further alleges that the Mayor failed to respond to the request by the end of the 10-day extension period he invoked in response to the request, as required by the Ordinance.

**COMPLAINANT FILES COMPLAINT:**

On February 22, 2010, Daly filed a complaint with the Task Force alleging a violation of Sunshine Ordinance § 67.25(a).

**JURISDICTION**

The Mayor clearly is a charter department under the Sunshine Ordinance and a public agency under the California Public Records Act. The Task Force therefore has jurisdiction to hear the public records complaint.

**APPLICABLE STATUTORY SECTION(S):**

**Section 67 of the San Francisco Administrative Code:**

Section 67.21 deals with responses to a public records request and the format of requests and of responsive documents.

Section 67.25 deals with the immediacy of a response to a public records request.

Section 67.26 deals with withholding of records.

Section 67.27 deals with written justification for withholding of records.

**Section 6250 et seq. of Cal. Gov't Code**

Section 6254 deals with responding to a public records request.

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**APPLICABLE CASE LAW:**

- *Buck v. Gregory*, 65 Cal.2d 666, 676 (1967).

**ISSUES TO BE DETERMINED****1. FACTUAL ISSUES**

**A. Uncontested Facts:** Daly requested the public records, as alleged. On February 5, 2010, the Mayor responded by invoking a 10-day extension under the Ordinance, based on two factors: 1) the IDR was a "more extensive and demanding request" and not a "simple routine or readily answerable request;" and 2) the IDR involved information that was voluminous, was "located at a remote storage facility," or that involved "the need to consult with another interested department."

**B. Contested Facts:** On February 11, 2010, the Mayor, through Deputy Communications Director Joe Arellano, further responded to Daly's request by letter, stating that Daly's request was extremely broad and would require considerable City resources to review possibly responsive communications for whether they fit the criteria of the request or were otherwise privileged and exempt from disclosure. The Mayor further requested that Daly narrow his request by identifying the subject matter in which he was interested to help the department focus its search for responsive public records. The letter further invoked a "rule of reason" from case law that it argued applied to public records requests, and implied that Daly's request did not fit that rule, but rather was an attempt to look indiscriminately into the agencies records.

Daly responded by email through his aide, April Veneracion, on February 17, 2010, to Joe Arellano, Mayor's Office of Communications, stating that Daly's records request was not burdensome and in fact was so focused that it should have received a response within the 24 hours required for an IDR. Daly stated that the request was specifically focused on communications between a specific individual and two departments for a discrete time period. The email further stated that a search for responsive documents should be easy to complete, particularly in regard to emails that could be readily searched through the Lotus Notes email system. It concluded by repeating that Daly expected a response by the end of the 10 day extension period on February 19, 2010.

At 6:21 p.m. on February 17, 2010, Ms. Veneracion's received an automatically generated response from the email of Joe Arellano stating that the recipient was out of the office from 2/13/10 until 2/23/10. At 6:23 p.m. that same day, Ms. Veneracion forwarded to the general email address for the Mayor's press office, "mayorspresso@sfgov.org", the same email she had previously sent to Mr. Arellano. On February 18, 2010 at noon, she again forwarded the same email to Laura Hauser, whose identify is not further specified in the complaint.

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

- Has the Mayor ever produced the requested documents?
- If so, when?
- Were documents withheld from production?
- If so, was any justification offered for the withholding of documents?
- What facts exist to support the claim made by the Mayor that the IDR was a "more extensive and demanding request," and not a "simple routine or readily answerable request?"
- What facts exist to support the claim made by the Mayor that the IDR involved information that was voluminous, "located at a remote storage facility," or involved "the need to consult with another interested department?"
- How many potentially responsive documents had been identified by the Mayor at the time of his February 5, 2010 response? At the time of his February 11, 2010 letter?

**2. LEGAL ISSUES/LEGAL DETERMINATIONS:**

Were sections of the Sunshine Ordinance, Public Records Act, and/or California Constitution Article I, Section three violated?

- Does the "rule of reason" of *Buck v. Gregory* apply to a public records request under the Sunshine Ordinance?
- May a custodian of records require a requester of public records to identify the reason he seeks records in responding to the request?

**SUGGESTED ANALYSIS**

One key question is whether the Mayor timely responded to Supervisor Daly by properly invoking an extension of time to respond, as allowed under § 67.25(a). Because the complainant has the burden of proving a violation, Supervisor Daly must provide sufficient information from which it could fairly be concluded that the Mayor's invocation of the extension was not justified. If Daly has done so, the Task Force may conclude that the extension of time provided for by § 67.25(a) was not properly invoked by the Mayor and that the Mayor therefore violated § 67.25.

The Task Force also may wish to consider whether Mayor's response, if any, was timely even under the extended time period invoked by him, whether any documents were properly withheld from any response, and whether the Mayor provided sufficient written justification for any withholding. Finally, the Task Force may wish to consider whether any violation was willful.

**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.**

**ATTACHED STATUTORY SECTION FROM CHAPTER 67 OF THE SAN FRANCISCO ADMINISTRATIVE CODE UNLESS OTHERWISE SPECIFIED**

**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.

(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 to program or reprogram a computer to respond to a request for information or to release information where the release of that information would violate a licensing agreement or copyright law.

**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.

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(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 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.

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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.

**CAL. PUBLIC RECORDS ACT (GOVT. CODE §§ 6250, ET SEQ.)****§ 6253.9.**

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

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

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

**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

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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.
- (4) The need to compile data, to write programming language or a computer program, or to construct a computer report to extract data.





SUNSHINE ORDINANCE TASK FORCE  
 1 Dr. Carlton B. Goodlett Place, Room 244, San Francisco CA 94102  
 Tel. (415) 554-7724; Fax (415) 554-7854  
 http://www.sfgov.org/sunshine

**SUNSHINE ORDINANCE COMPLAINT**

Complaint against which Department or Commission Mayor's office

Name of individual contacted at Department or Commission Michael Varne / Joe Arellano

Alleged violation public records access  
 Alleged violation of public meeting. Date of meeting \_\_\_\_\_

Sunshine Ordinance Section Administrative Code Section 07.25(a)  
 (If known, please cite specific provision(s) being violated)

Please describe alleged violation. Use additional paper if needed. Please attach any relevant documentation supporting your complaint.

Failure to respond to written request at the end of a 10 day extension period. Please see attached for detailed correspondence.

Do you want a public hearing before the Sunshine Ordinance Task Force?  yes  no  
 Do you also want a pre-hearing conference before the Complaint Committee?  yes  no

(Optional)<sup>1</sup>  
 Name April Veneracion Address Dr Carlton B. Goodlett Dr.

Telephone No. 415.554-7970 E-Mail Address chris.daly@sf.gov

Date 2/22/10 [Signature]  
 Signature

I request confidentiality of my personal information.  yes  no

<sup>1</sup> NOTICE: PERSONAL INFORMATION THAT YOU PROVIDE MAY BE SUBJECT TO DISCLOSURE UNDER THE CALIFORNIA PUBLIC RECORDS ACT AND THE SUNSHINE ORDINANCE, EXCEPT WHEN CONFIDENTIALITY IS SPECIFICALLY REQUESTED. YOU MAY LIST YOUR BUSINESS/OFFICE ADDRESS, TELEPHONE NUMBER AND E-MAIL ADDRESS IN LIEU OF YOUR HOME ADDRESS OR OTHER PERSONAL CONTACT INFORMATION. Complainants can be anonymous as long as the complainant provides a reliable means of contact with the SOTF (Phone number, fax number, or e-mail address).

07/31/08

**CHRIS DALY**

Member, Board of Supervisors  
District 6



**COMMITTEES**

City & School District

**MEMBER**

Bay Area Air Quality Management District  
Joint Powers Committee  
Transbay Joint Powers Authority  
Treasure Island Development Authority  
Metropolitan Transportation Commission

**IMMEDIATE DISCLOSURE REQUEST**

To: Michael Yarne  
From: Chris Daly  
Date: February 4, 2010  
Re: Immediate Disclosure Request

RECEIVED  
MAYOR'S OFFICE  
10 FEB - 4 PM 5:02

Pursuant to San Francisco's Sunshine Ordinance and California Public Records Act, I hereby request all written communications between Michael Yarne and the Planning Department, the Mayor's Office of Housing and the Controller between October 1, 2009 and January 31, 2010.

I would greatly appreciate your office responding immediately or no later than the close of business February 5, 2010. As it is required by Administrative Code Section 67.25(a) which states in relevant part, "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."

Please contact April Veneracion, (415) 554-7972 when the documents are available to review.

*Handwritten initials*

Office of the Mayor  
City & County of San Francisco



Gavin Newsom

February 5, 2010

Supervisor Chris Daly

Re: Immediate Disclosure Request Received on February 4, 2010

Dear Supervisor Daly:

This letter responds to your "immediate disclosure request" for "all written communications between Michael Yarne and the Planning Department, the Mayor's Office of Housing and the Controller between October 1, 2009 and January 31, 2010.

This office is invoking an extension to your request under the Sunshine Ordinance, Administrative Code Section 67.25(b). This office will respond to your request within 10 business days of its receipt as permitted in Administrative Code Section 67.25(a).

The extension is based on the following factors.

Your request falls into the category of "more extensive or demanding requests" and is not a "simple routine or other readily answerable request," as described in Section 67.25(a).

Your request involves information that is "voluminous," "is located at a remote storage facility," or involves "the need to consult with another interested department."

Sincerely,

A handwritten signature in black ink, appearing to read "Joe Arellano".

Joe Arellano  
Deputy Communications Director  
Mayor Gavin Newsom

Office of the Mayor  
City & County of San Francisco



Gavin Newsom

February 11, 2010

Supervisor Chris Daly

**Re: February 4, 2010 Public Records Request**

Dear Supervisor Daly:

Your have requested "all written communications between Michael Yarne and the Planning Department, the Mayor's Office of Housing and the Controller between October 1, 2009 and January 31, 2010."

This request is extremely broad and will require considerable City resources in order to respond. Mr. Yarne will need to review all of his communications for the time period and then determine for each whether there are any communications – for example those involving attorneys to which the attorney client privilege may attach – that should be exempted or redacted.

In light of the burden of responding, we would appreciate it if you could identify the subject matter in which you are interested. That would assist in narrowing the search, reducing the burden, and getting you the specific documents that you seek.

Generally, the public records laws require a request to be sufficiently particular to identify a category of documents and not require a wholesale review of an agency's files. See Government Code Section 6253(b) (a request must reasonably describe an identifiable record or records). The Good Government Guide issued by the City Attorney states:

A records request must specify an identifiable record or category of records sought. The law does not give the requester the right to look indiscriminately through the files of an agency. A request may not properly ask to inspect or receive copies of "all of your records." (2007-08 Edition, at p. 68.)

Moreover, the courts have applied a "rule of reason" to public records requests. See *Buck v. Gregory*, 65 Cal.2d 666, 676 (1967) (public records states are "subject to an implied rule of reason" and "inherent reasonableness limitations").

Your request for all of Mr. Yarnes's e-mails to particular departments over a lengthy period of time could be viewed as lacking the particularity required of a public records act request and also as not reasonable. We would like to work with you in narrowing the request to identify the subject matter in which you are interested in order to conserve City resources. We look forward to hearing from you.

Sincerely,

A handwritten signature in black ink that reads "Joe Arellano".

Joe Arellano  
Deputy Communications Director  
Mayor Gavin Newsom

April  
Veneracion/BOS/SFGOV  
02/17/2010 06:21 PM

To Joe Arellano/MAYOR/SFGOV@SFGOV  
cc chris.daly@sfgov.org  
bcc  
Subject Re: February 4, 2010 Public Records Request


Dear Mr. Arellano,

The request that was submitted to your office on February 4, 2010 is not burdensome and should have been available within the 24 hour period as requested. The information requested is specific to a category of documents. The request specifically limits the scope to all written communications between Michael Yarne and the Planning Department, the Mayor's Office of Housing and the Controller between October 1, 2009 and January 31, 2010. This is not a wholesale review of an agency's files. The request is simple, clear and should be easily produced, in part, by searching through the Lotus Notes system and computer drive. This should certainly be available with the 10 day extension period that you requested on February 5, 2010. We expect the documents requested at the end of this 10 day extension on Friday, February 19, 2010 by 5:00 pm.

Sincerely,  
April Veneracion

---

April Veneracion  
Legislative Aide  
Office of District 6 Supervisor Chris Daly  
San Francisco Board of Supervisors  
(415) 554-7972 Office  
(415) 554-7974 Fax  
april.veneracion@sfgov.org  
Joe Arellano/MAYOR/SFGOV

 Joe  
Arellano/MAYOR/SFG  
OV

02/11/2010 05:12 PM

To April Veneracion/BOS/SFGOV@SFGOV  
cc  
Subject Re: February 4, 2010 Public Records Request

February 11, 2010



Joe Arellano/MAYOR/SFGOV

02/17/2010 06:21 PM

To April Veneracion/BOS/SFGOV

cc

bcc

Subject AUTO: Joe [REDACTED] is out of the office - Not Checking E-Mail  
(returning 02/23/2010 09:00 AM)

I am out of the office from 02/13/2010 12:00 AM until 02/23/2010 09:00 AM.

For media inquiries or immediate assistance, please contact the Mayor's Office of Communications at (415) 554-6131 or via e-mail at [mayorspressoffice@sfgov.org](mailto:mayorspressoffice@sfgov.org)

Note: This is an automated response to your message "Re: February 4, 2010 Public Records Request" sent on 02/17/2010 18:21:25.

This is the only notification you will receive while this person is away.

April  
Veneracion/BOS/SFGOV  
02/18/2010 11:58 AM

To laura.hauser@sfgov.org  
cc  
bcc  
Subject Fw: Immediate Attention Needed - February 4, 2010 Public  
Records Request

April  
Veneracion/BOS/SFGOV  
02/17/2010 06:23 PM

To mayorspressooffice@sfgov.org  
cc  
Subject Immediate Attention Needed - February 4, 2010 Public  
Records Request

I received an out of office reply from Mr. Arellano's office. This matter needs immediate attention in his absence.

Thank you,  
April Veneracion

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April Veneracion  
Legislative Aide  
Office of District 6 Supervisor Chris Daly  
San Francisco Board of Supervisors  
(415) 554-7972 Office  
(415) 554-7974 Fax  
april.veneracion@sfgov.org  
----- Forwarded by April Veneracion/BOS/SFGOV on 02/17/2010 06:23 PM -----

April  
Veneracion/BOS/SFGOV  
02/17/2010 06:21 PM

To Joe Arellano/MAYOR/SFGOV  
cc chris.daly@sfgov.org  
Subject Re: February 4, 2010 Public Records Request

Dear Mr. Arellano,

The request that was submitted to your office on February 4, 2010 is not burdensome and should have been available within the 24 hour period as requested. The information requested is specific to a category of documents. The request specifically limits the scope to all written communications between Michael Yarne and the Planning Department, the Mayor's Office of Housing and the Controller between October 1, 2009 and January 31, 2010. This is not a wholesale review of an agency's files. The request is simple, clear and should be easily produced, in part, by searching through the Lotus Notes system and computer drive. This should certainly be available with the 10 day extension period that you requested on February 5, 2010. We expect the documents requested at the end of this 10 day extension on Friday, February 19, 2010 by 5:00 pm.

The following information is for your information only. It is not intended to be used as a substitute for professional advice. The information is based on the information provided to us by the client and is subject to change without notice. We do not warrant the accuracy or completeness of the information. The information is provided for your information only and should not be relied upon for any purpose. The information is not intended to be used as a substitute for professional advice. The information is based on the information provided to us by the client and is subject to change without notice. We do not warrant the accuracy or completeness of the information. The information is provided for your information only and should not be relied upon for any purpose.