

Date: April 22, 2008

Item No. 13
File No. 08004,
08005 &
08007

SUNSHINE ORDINANCE TASK FORCE

AGENDA PACKET CONTENTS LIST*

- Order Of Determination Crossman vs CAO**
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Completed by: Frank Darby

Date: April 16, 2008

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

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

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

SUNSHINE ORDINANCE
TASK FORCE



City Hall
1 Dr. Carlton B. Goodlett Place, Room 244
San Francisco 94102-4689
Tel. No. (415) 554-7724
Fax No. 415) 554-7854
TDD/TTY No. (415) 554-5227

ORDER OF DETERMINATION

DATE THE DECISION ISSUED

March 31, 2008

KIMO CROSSMAN v. SAN FRANCISCO CITY ATTORNEY'S OFFICE AND THE SUPERVISOR OF RECORDS (08004, 08005, & 08007)

FACTS OF THE CASE

In Complaint Number 08004 Kimo Crossman states the following:

On December 6, 2007, Kimo Crossman made an Immediate Disclosure Request ("IDR") for public records with Alexis Thompson of the City Attorney's Office. Crossman's IDR requested all communications and advice for the period of May 2007 to the present with the City Attorney's Office, regarding matters related to Open Government, public records, Sunshine Task Force privacy as described in Government Code § 67.24(b)(1)(iii) & 67.21(i). Crossman also requested advice on compliance with, analysis of, an opinion concerning liability under, or any communication otherwise concerning the California Public Records Act, the Ralph M. Brown Act, the Political Reform Act, any San Francisco governmental ethics code, or this Ordinance. Crossman requested the detailed billing records related to the advice and detailed calendars of the attorneys providing the advice.

On December 7, 2007, Alexis Thompson responded and, based on Section 6253(c) of the Public Records Act and Section 67.25(b) of the Sunshine Ordinance, the CAO invoked an extension of time not to exceed 14 days to respond to the IDR.

Crossman claimed that he did not receive the records even after the extension. On 1/3/08, Crossman petitioned the Supervisor of Records from the City Attorney's Office and asked for a determination. DCA Paula Jesson responded to the request. Crossman stated that DCA Jesson's response was that he would have to wait until the City Attorney's Office completes their review of records.

In complaint number 08005, Crossman states the following:

On November 30 2007, Kimo Crossman made an Immediate Disclosure Request ("IDR") for public records with Alexis Thompson of the City Attorney's Office. Crossman's IDR requested all materials and correspondence with or about or provided to Harrison Sheppard, Task Force member. Crossman requested the attorney billing records and calendars of anyone in the CAO who has interacted with him.

On December 4, 2007, Alexis Thompson responded and based on Section 6253(c) of the Public Records Act and Section 67.25(b) of the Sunshine Ordinance, the CAO invoked an extension of time not to exceed 14 days to respond to the IDR.

Order of Determination

Crossman claimed that he did not receive the records even after the extension. On 1/3/08, Crossman petitioned the Supervisor of Records from the City Attorney's Office and asked for a determination. DCA Paula Jesson responded to the request. Crossman stated that DCA Jesson's response was that he would have to wait until the City Attorney's Office completes their review of records.

In complaint number 08007, Kimo Crossman states the following:

On December 4, 2007, Kimo Crossman made an Immediate Disclosure Request ("IDR") for public records with Alexis Thompson of the City Attorney's Office. Crossman's IDR requested all communications and advice provided to Angela Calvillo, Clerk of the Board regarding matters related to Open Government, public records, Sunshine Task Force or privacy as described in Government Code Section 67.24(b)(1)(iii) & 67.21(i). In addition, Kimo Crossman requested the advice on compliance with, analysis of, an opinion concerning liability under or any communication otherwise concerning the California Public Records Act, the Ralph M. Brown Act, the Political reform Act, any San Francisco governmental ethics code, or this ordinance.

On December 6, 2007, Alexis Thompson responded and based on Section 6253(c) of the Public Records Act and Section 67.25(b) of the Sunshine Ordinance, the CAO invoked an extension of time not to exceed 14 days to respond to the IDR.

Crossman claimed that he did not receive the records even after the extension. On 1/3/08, Kimo Crossman petitioned the Supervisor of Records from the City Attorney's Office and asked for a determination. DCA Paula Jesson responded to the request. Crossman stated that DCA Jesson's response was that Kimo Crossman would have to wait until the City Attorney's Office completes their review of records.

COMPLAINT FILED

On November 6, 2007, Crossman filed a complaint against the City Attorney's Office and on February 12, 2008 amended his complaint to include the Supervisor of Records alleging violations of Sections 67.1, 67.25(d), 67.26, 67.27, 67.21(a) and (b), (i), (I), 67.24(d), and 67.34 of the Sunshine Ordinance and State Government Code Sections 6253, and 6255.

HEARING ON THE COMPLAINT

On March 25, 2008, Complainant Kimo Crossman appeared before the Task Force and presented his complaints, focusing on the CAO's withholding of documents and information regarding advice and information provided to the District Attorney's office on compliance with Open Government laws. Respondent Agency was represented by Alexis Thompson, who presented the Agency's defense, including citing "legal uncertainty of the validity of §67.24(b)(1)(iii)" as a basis for not releasing the requested records.

The issue in the case is whether the Agency violated Sections 67.1, 67.21, 67.22, 67.26, 67.27, 67.29-5, and/or 67.34 of the Ordinance and/or Sections 6253 and/or 6255 of the CPRA.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based on the testimony and evidence presented, the Task Force finds the testimony of Kimo Crossman to be persuasive and finds that sections 67.21 (a) & (i), 67.24 (b)(1)(iii) are applicable in this case with respect to the alleged withholding of records and information on

Order of Determination

CAO's compliance with Open Government Laws applicable to the District Attorney's office. The Task Force does not find that testimony provided by the Agency persuasive to this case.

The Task Force finds that under the plain language of the Sunshine Ordinance, the advice the CAO gave to Supervisors and their agents regarding compliance with Open Government law is not exempt from disclosures. "All communications with the City Attorney's Office with regard to this ordinance, including petitions, requests for opinion, and opinions shall be public records." See 67.21(i). "Advice on compliance with, analysis of, an opinion concerning liability under, or any communication otherwise concerning the California Public Records Act, the Ralph M. Brown Act, the Political Reform Act, any San Francisco governmental ethics code, or this Ordinance." See 67.24(b)(1)(iii).

These specific statutory enactments prevail over any other applicable state law protection, including Cal. Govt. Code § 6254(k), pursuant to the terms of the Sunshine Ordinance and the California Public Records Act. See § 67.24 (providing "enhanced right of public access to information and records"); Cal. Govt. Code § 6253(e).

Moreover, the Task Force finds that the District Attorney's office, in dealing with the Open Government Issues covered by the complaint, is not engaged in the investigatory and prosecutorial functions of a district attorney governed by state law under Government Code § 23503, but is instead engaged in municipal functions governed by local law, including the Sunshine Ordinance. *Accord Rivero v. Superior Court*, 54 Cal. App. 4th 1048 (Cal. Ct. App. 1997).

DECISION AND ORDER OF DETERMINATION

The Task Force finds that the agency violated §§67.21 (a) & (i), 67.24 (b)(1)(iii) of the Sunshine Ordinance for failure to produce records regarding communications between the City Attorney's Office and the District Attorney under the attorney-client privilege and/or work product protection. Under the Sunshine Ordinance all such communications and information are public records not exempt from disclosure. The agency shall release the records requested within 5 days of the issuance of this Order and appear before the Compliance and Amendments Committee on April 9, 2008.

This Order of Determination was adopted by the Sunshine Ordinance Task Force on March 25, 2008, by the following vote: (Craven/Knee)

Ayes: Craven, Knee, Cauthen, Comstock, Chan, Goldman, Williams

Noes: Pilpel

Absent: Wolfe

Excused: Chu



Doug Comstock, Chair
Sunshine Ordinance Task Force

c: Ernie Llorente, Deputy City Attorney
Kimo Crossman, Complaint
Alexis Thompson, Deputy Press Secretary




DENNIS J. HERRERA
City Attorney

ALEXIS THOMPSON
Public Information Officer

Direct: (415) 554-4653
Email: alexis.thompson@sfgov.org

April 8, 2008

Honorable Members, Sunshine Ordinance Task Force
c/o Frank Darby, Jr., Administrator
Sunshine Ordinance Task Force
1 Dr. Carlton B. Goodlett Place
City Hall, Room 244
San Francisco, CA 94102-4689
Email: SOTF@SFGov.org

RECEIVED
BOARD OF SUPERVISORS
SAN FRANCISCO
2008 APR - 8 PM 3:13
BY 

Re: Complaint Nos. 08004, 08005, and 08007

Dear Honorable Members of the Sunshine Ordinance Task Force,

We received your Order of Determination in the above referenced matters. For the reasons previously stated in our correspondence of March 6th, March 10th and March 19th, copies enclosed, we respectfully disagree with your Decision and Order of Determination regarding the release of confidential attorney-client communications with the District Attorney's office. We stand by our earlier position, and will not be sending a representative to your committee meeting on April 9, 2008.

Very truly yours,

DENNIS J. HERRERA
City Attorney

ALEXIS THOMPSON
Public Information Officer



Alexis Thompson/CTYATT
03/19/2008 03:55 PM

To kimo@webnetic.net
cc
bcc Allie Fisher/CTYATT@CTYATT; Paula
Jesson/CTYATT@CTYATT; Liz Valdez/CTYATT@CTYATT
Subject Re: Communications w/ District Attorney

Dear Mr. Crossman,

On December 6, 2007, you asked for all communications and advice with the District Attorney's Office for the period of May 2007 to the date of the request regarding matters related to "Open Government, public records, Sunshine Task Force, or privacy...." In addition, you asked for attorney billing records related to this advice and calendar entries for attorneys who have advised the District Attorney on these matters.

On March 10, 2008, this office responded to your request, declining to provide the records because the District Attorney's Office had written to this office, stating that it is the holder of the attorney-client privilege with respect to the records and directing this office not to publish the communications between this office and the District Attorney's Office.

This response addresses your request for billing records and calendars.

The billing records that you requested are sent with this message. The records have portions redacted for two reasons. First, some redactions are made to protect privileged and confidential attorney client communications. Cal. Evid. Code Sec. 950 et seq; Cal. Bus. & Prof. Code Sec. 6068(e)(1); Cal. Gov't Code Sec. 6276.04. These redactions are marked "AC." Second, some redactions are withheld under the attorney work product doctrine, Cal. Civil Code Sec. 2018. These redactions are marked "WP."

With respect to the calendars of deputies, none have entries that in any way reflect or refer to the records that you request.



HOURS_DA.DOC.pdf

Best,
ALEXIS THOMPSON
Deputy Press Secretary

OFFICE OF CITY ATTORNEY DENNIS HERRERA
San Francisco City Hall, Room 234
1 Dr. Carlton B. Goodlett Place
San Francisco, California 94102-4682

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<http://www.sfgov.org/cityattorney/>



Alexis Thompson/CTYATT
03/10/2008 11:11 AM

To kimo@webnetic.net
cc
bcc
Subject RE: Request from 1/03/08 re: Communications w/ District Attorney

Dear Kimo,

On March 6, 2008, this office responded to your request for communications with the District Attorney's Office regarding matters related to "Open Government, public records, Sunshine Taskforce, or privacy..." We declined to provide the records that you requested because the District Attorney's Office had written to this office, stating that it is the holder of the attorney-client privilege with respect to the records and directing this office not to publish the communications between this office and the District Attorney's Office.

Later that day, you sent an email message in response, asking that we "under 67.21 C please describe the communications including quantity within seven days."

San Francisco Administrative Code Section 67.21 (c) does not require this office to provide you with a description of the withheld records. The Section provides as follows:

"(c) A custodian of a public records 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) [i.e., a public records request]. A custodian of any public records, when not in possession of record requested, shall assist a requester in directing a request to the proper office or staff person."

Section 67.21(c) recognizes the difficulty that the average citizen has in understanding how City departments create and maintain their records. A member of the public may have an interest in an issue but not know enough about the various records maintained by City departments to know how to formulate a request or to which department to direct a request. Thus, Section 67.21 (c) requires City departments to provide a statement describing their records "with enough specificity to enable a requester to identify records in order to make a request..." The purpose of this Section is to aid persons in formulating public records requests.

In this case, we have not withheld records because of any problem in the formulation of your request, but have done so based on the attorney-client privilege. Providing you with a statement of the "existence, quantity, form and nature" of the withheld records would not further the purposes of Section 67.21 (c) because it would provide no assistance to you in formulating a request to obtain the records in question. See also, Good Government Guide 2007-2008 Edition, page 131 (when informing a requester that the department is declining to disclose records based on an exemption from the disclosure requirements, "[t]here is no requirement that the department provide the requester with a document log listing the documents the department is declining to disclose.") Because the purpose of Section 67.21 (c) is not to assist a requester in identifying or describing records that have been withheld, we decline to provide you with a statement under Section 67.21 (c) about the withheld records.

Best,
ALEXIS THOMPSON
Deputy Press Secretary

OFFICE OF CITY ATTORNEY DENNIS HERRERA

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— Forwarded by Alexis Thompson/CTYATT on 03/06/2008 04:33 PM —



"Kimo Crossman"
<kimo@webnetic.net>

03/06/2008 04:04 PM

Please respond to
<kimo@webnetic.net>

To "Alexis Thompson" <Alexis.Thompson@sfgov.org>

cc "Allen Grossman" <grossman356@mac.com>

Subject RE: Request from 1/03/08 re: Communications w/ District Attorney

While I disagree and will respond further, under 67.21 C please describe the communications including quantity within seven days

From: Alexis Thompson [mailto:Alexis.Thompson@sfgov.org]

Sent: Thursday, March 06, 2008 9:21 AM

To: kimo@webnetic.net

Subject: re: Request from 1/03/08 re: Communications w/ District Attorney

Dear Mr. Crossman,

You have asked for "all communications and advice for the period of May 2007- Present with the San Francisco District Attorney's office regarding matters related to Open Government, public records, Sunshine Taskforce or privacy as described in [specified sections of the Sunshine Ordinance]."

Under Charter Section 6.102, the City Attorney is the attorney for the City and County of San Francisco, including the San Francisco District Attorney and other elected City and County officials. The District Attorney's Office has written to this office, stating that it is the holder of the attorney-client privilege in this instance and informing us that it does not waive the privilege with respect to the records that you have requested. The District Attorney has expressly directed this office not to publish any communications between this office and the District Attorney's Office. See the attached letter from Paul Henderson, Chief of Administration to Dennis Herrera, dated February 25, 2008.

Assistant District Attorney Henderson cites two statutes in his letter, California Evidence Code section 950 *et seq* . (the client has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer) and California Business and Professions Code section 6068(e)(1) ("[I]t is the duty of an attorney . . . [t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.").

We also note that lawyers have an ethical obligation under the California Rules of Professional Conduct not to reveal information protected from disclosure under Business and Professions Code section 6068(e)(1) without the informed consent of the client (unless the lawyer reasonably believes that

disclosure of the communication relates to the prevention of a criminal act that is likely to result in the death of, or substantial bodily harm to, an individual). Rules of Professional Conduct, Rule 3-100. See also, California Government Code section 6276.04 (among the records not required to be disclosed under the Public Records Act are attorney-client confidential communications protected under Business and Professions Code section 6068 and Evidence Code Sections prohibiting the disclosure of confidential attorney-client communications).

Section 67.24(b)(1)(iii) of the Sunshine Ordinance provides that "[a]dvice on compliance with, analysis of, an opinion concerning liability under, or any communication otherwise concerning the California Public Records Act . . . or this Ordinance" are subject to disclosure. Although the practice of this office is to alert City clients seeking written legal advice to this provision of the Sunshine Ordinance, we have also noted that there may be instances where the disclosure of attorney-client communications may conflict with the Charter and State law. See the Good Government Guide, 2007-08 edition (the first discussion is on pages 15-16 and the second on page 76):

The City Attorney's Role in Providing Ethics and Open Government Advice

Finally, City officers and employees should be aware that legal advice on ethics laws and open government laws may not be confidential for another reason. The Sunshine Ordinance provides that notwithstanding any exemption provided by law, any written legal advice about conflicts or open government laws may not be withheld from disclosure in response to a request for records under the Sunshine Ordinance. Accordingly, the practice of the City Attorney's Office is to make clear to any officer or employee who requests such advice in writing that the advice may be subject to disclosure upon request by a member of the public.

Attorney-Client Communication

A department may decline to disclose any attorney-client privileged communication between the department and its attorneys. State law makes communications between the City Attorney and those officials and employees privileged and confidential. Evidence Code § 950 *et seq.*

The Sunshine Ordinance requires disclosure of advice memoranda regarding the California Public Records Act, the Brown Act, the Political Reform Act, any "San Francisco governmental ethics code," or the Sunshine Ordinance. Admin. Code § 67.24(b)(1)(iii). At the same time the Charter and State law create attorney-client relationships between the City Attorney and City officials. Charter § 6.102. There may be instances where public disclosure of an attorney-client communication may conflict with the Charter and State law. Departments should refer requests for attorney-client communications to the City Attorney's Office.

The attorney-client privilege belongs to the client, not the attorney. Thus, records covered by the privilege that the City Attorney possesses must remain confidential unless the client – the City – consents to their disclosure. Bus. & Prof. Code § 6068(e).

In light of the legal uncertainty of the validity of Section 67.24(b)(1)(iii), the otherwise privileged

nature of the attorney-client communications in question, and the direction by the District Attorney's office not to disclose these communications, this office has both a legal and ethical duty to assert the privilege in response to your request. For these reasons, we decline to provide the records that you have requested.

Best,
ALEXIS THOMPSON
Deputy Press Secretary

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KAMALA D. HARRIS
DISTRICT ATTORNEY
CITY AND COUNTY OF SAN FRANCISCO

February 25, 2008

Dennis Herrera
San Francisco City Attorney's Office
City Hall, Room 234
San Francisco, CA 94102

Dear Mr. Herrera,

The San Francisco City Attorney's Office recently received a Sunshine Ordinance request from Kimo Crossman for all communications with the District Attorney's Office relating to open government, public records, Sunshine Task Force or privacy.

As you know, the City Attorney's Office and the District Attorney's Office have an attorney-client relationship. As such, all communications and advice between the District Attorney's Office and the City Attorney's Office are protected under the attorney-client privilege under California Evidence Code section 950 et seq. and California Business and Professions Code section 6068(e)(1).

As the client, only the District Attorney's Office holds the right to waive the attorney-client privilege. (See Roberts v. Palmdale (1993) 5 Cal.4th 363, 373.)

The District Attorney's Office does not waive the privilege. Thus, please do not publish any communications between the City Attorney's Office by the District Attorney's Office.

Sincerely,

A handwritten signature in cursive script that reads "Paul Henderson".

Paul Henderson
Chief of Administration



Alexis Thompson/CTYATT
03/06/2008 09:20 AM

To kimo@webnetic.net
cc
bcc

Subject re: Request from 1/03/08 re: Communications w/ District Attorney

Dear Mr. Crossman,

You have asked for "all communications and advice for the period of May 2007- Present with the San Francisco District Attorney's office regarding matters related to Open Government, public records, Sunshine Taskforce or privacy as described in [specified sections of the Sunshine Ordinance]."

Under Charter Section 6.102, the City Attorney is the attorney for the City and County of San Francisco, including the San Francisco District Attorney and other elected City and County officials. The District Attorney's Office has written to this office, stating that it is the holder of the attorney-client privilege in this instance and informing us that it does not waive the privilege with respect to the records that you have requested. The District Attorney has expressly directed this office not to publish any communications between this office and the District Attorney's Office. See the attached letter from Paul Henderson, Chief of Administration to Dennis Herrera, dated February 25, 2008.

Assistant District Attorney Henderson cites two statutes in his letter, California Evidence Code section 950 *et seq.* (the client has a privilege to refuse to disclose, and to prevent another from disclosing; a confidential communication between client and lawyer) and California Business and Professions Code section 6068(e)(1) ("[I]t is the duty of an attorney . . . [t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.").

We also note that lawyers have an ethical obligation under the California Rules of Professional Conduct not to reveal information protected from disclosure under Business and Professions Code section 6068(e)(1) without the informed consent of the client (unless the lawyer reasonably believes that disclosure of the communication relates to the prevention of a criminal act that is likely to result in the death of, or substantial bodily harm to, an individual). Rules of Professional Conduct, Rule 3-100. See also, California Government Code section 6276.04 (among the records not required to be disclosed under the Public Records Act are attorney-client confidential communications protected under Business and Professions Code section 6068 and Evidence Code Sections prohibiting the disclosure of confidential attorney-client communications).

Section 67.24(b)(1)(iii) of the Sunshine Ordinance provides that "[a]dvice on compliance with, analysis of, an opinion concerning liability under, or any communication otherwise concerning the California Public Records Act . . . or this Ordinance" are subject to disclosure. Although the practice of this office is to alert City clients seeking written legal advice to this provision of the Sunshine Ordinance, we have also noted that there may be instances where the disclosure of attorney-client communications may conflict with the Charter and State law. See the Good Government Guide, 2007-08 edition (the first discussion is on pages 15-16 and the second on page 76):

The City Attorney's Role in Providing Ethics and Open Government Advice

Finally, City officers and employees should be aware that legal advice on ethics laws and open government laws may not be confidential for another reason. The Sunshine Ordinance provides that notwithstanding any exemption provided by law, any written legal advice about conflicts or open government laws may not be withheld from disclosure in response to a request for records under the Sunshine Ordinance. Accordingly, the practice of the City Attorney's Office is to make

clear to any officer or employee who requests such advice in writing that the advice may be subject to disclosure upon request by a member of the public.

Attorney-Client Communication

A department may decline to disclose any attorney-client privileged communication between the department and its attorneys. State law makes communications between the City Attorney and those officials and employees privileged and confidential. Evidence Code § 950 *et seq.*

The Sunshine Ordinance requires disclosure of advice memoranda regarding the California Public Records Act, the Brown Act, the Political Reform Act, any "San Francisco governmental ethics code," or the Sunshine Ordinance. Admin. Code § 67.24(b)(1)(iii). At the same time the Charter and State law create attorney-client relationships between the City Attorney and City officials. Charter § 6.102. There may be instances where public disclosure of an attorney-client communication may conflict with the Charter and State law. Departments should refer requests for attorney-client communications to the City Attorney's Office.

The attorney-client privilege belongs to the client, not the attorney. Thus, records covered by the privilege that the City Attorney possesses must remain confidential unless the client - the City - consents to their disclosure. Bus. & Prof. Code § 6068(e).

In light of the legal uncertainty of the validity of Section 67.24(b)(1)(iii), the otherwise privileged nature of the attorney-client communications in question, and the direction by the District Attorney's office not to disclose these communications, this office has both a legal and ethical duty to assert the privilege in response to your request. For these reasons, we decline to provide the records that you have requested.

Best,
ALEXIS THOMPSON
Deputy Press Secretary

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"Kimo Crossman"
<kimo@webnetic.net>
04/08/2008 04:19 PM

To "Alexis Thompson" <Alexis.Thompson@sfgov.org>,
"SOTF" <soft@sfgov.org>
"Matt Dorsey" <Matt.Dorsey@sfgov.org>, "Paula Jesson"
cc <Paula.Jesson@sfgov.org>, <Paul.Zarefsky@sfgov.org>,
<buck.delventhal@sfgov.org>, "Richard A. Knee"
bcc
Subject RE: Order of Determination:#08004/08005/08007_Kimo
Crossman v. City Attorney

Ms. Thompson

Now that the SOTF has made its determination judging all the facts and arguments, your office is required to follow as specified under the Sunshine Ordinance which has the weight of State Law 6253 (e).

Additionally, your office has provided no legal reasoning to justify your new refusal.

Please bring people from your office who can speak with authority on this matter unlike your previous presentations..