Date: April 22, 2008

Item No. 5
File No. 07092

SUNSHINE ORDINANCE TASK FORCE

AGENDA PACKET CONTENTS LIST*

☒	**Appeal by Patrick Monette-Shaw vs BOS & DHR**
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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

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ORDER OF DETERMINATION
February 26, 2008

March 6, 2008

Patrick Monette-Shaw
975 Sutter Street, Apt. 6
San Francisco, CA 94109

Angela Calvillo
Board of Supervisors
City Hall, Room 244
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102

Jennifer Johnston
Department of Human Resources
44 Gough St.
San Francisco, CA 94103

Re: Complaint #07092 filed by Patrick Monette-Shaw against the Board of Supervisors and Human Resources Department for alleged violation of Sections 67.10, 67.8 (a)(5) of the Sunshine Ordinance and Government Code Section 54957.6 (a) for improperly holding a closed session.

Based on the information provided to the Task Force from the Complainant, Patrick Monette-Shaw, and Respondents Angela Calvillo, and Jennifer Johnston, the following Order of Determination is adopted:

The Sunshine Ordinance Task Force finds that the Board of Supervisors technically violated Section 67.10 (e)(1) of the Sunshine Ordinance for failing to clearly identify the agenda item.

This Order of Determination was adopted by the Sunshine Ordinance Task Force on February 26, 2008, by the following vote: (Comstock / Knee)
Ayes: Knee, Cauthen, Comstock, Pilpel, Chan, Goldman, Williams
Noes: Chu, Wolfe
Excused: Craven

Doug Comstock, Chair
Sunshine Ordinance Task Force

c: Ernie Llorente, Deputy City Attorney

pmonette-shaw
<Pmonette-shaw@earthlink.net>

03/23/2008 04:41 PM

Please respond to Pmonette-shaw@earthlink.net

To: "Frank Darby, SOTF Administrator" <sotf@sfgov.org>, Doug Comstock <dougcoms@aol.com>, "Frank Darby, SOTF Administrator" <sotf@sfgov.org>

cc: 'Angela Calvillo' <Angela.Calvillo@sfgov.org>, Jennifer Johnston <jennifer.johnston@sfgov.org>, Ernest Llorente <Ernest.Llorente@sfgov.org>, Richard Knee

bcc:

Subject: Appeal of SOTF Order of Determination on Complaint 07092 (Monette-Shaw vs. Board fo SUpervisors/DHR) Re: Improper Use of "Technical Violations

History: This message has been forwarded.

March 23, 2008.

Dear Mr. Darby,

Please forward the attached appeal to each member of the Sunshine Task Force.

I believe the Task Force improperly used the concept of "technical violations" in its Order of Determination.

Thank you.

Patrick Monette-Shaw


attqzaep.pdf


attcfgwm.pdf

Patrick Monette-Shaw

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San Francisco, CA 94109
Phone: (415) 292-6969 • e-mail: pmonette-shaw@eartlink.net

March 23, 2008

Sunshine Ordinance Task Force
City Hall, Room 244
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102-4689

Re: Appeal of SOTF Order of Determination, # 07092, *Patrick Monette-Shaw v BOS* as a "Technical Violation"

Dear Sunshine Task Force Members:

Summary

On February 26, 2008 the SOTF improperly ruled that the Board of Supervisors were found to be in "technical violation" of Section 67.10(e)(1) of the Sunshine Ordinance, in my Sunshine Complaint # 07092, *Patrick Monette-Shaw v BOS*, for having failed to "clearly" identify an agenda item.

I believe the SOTF improperly ruled that the Board's meeting agenda of November 20, 2007 was merely a "technical" violation. Beyond that, when I complained of a violation of 67.10(e)(1), I did not complain that it was a failure to clearly identify an agenda item, I complained that Section 67.10(e)(1) had been violated because the "solely" provision had not been triggered by active contract negotiations being held, not for having improperly clearly identified an agenda item.

I further believe that the SOTF all too frequently uses the concept of "technical violations," when it should, instead, be issuing Orders of Determination explicitly stating a substantial violation of the Ordinance when one occurs.

In *Smith v. Board of Supervisors* (1989), against the San Francisco Board of Supervisors, the Court of Appeals of California, First Appellate District, Division Two, issued an opinion on December 18, 1989 that a deficient Bielenson hearing notice required by the Bielenson Act (Health and Safety Code § 1442.5) was "not merely technically imperfect; it was legally insufficient."

Louise Renne, the then-City Attorney and Paula Jesson, a then Deputy City Attorney for Defendant San Francisco, attempted to postulate in 1989 that since San Francisco's budgetary process is unique in California, the City was not bound by § 1442.5 and its very précise notice requirements, because it had been the Mayor's Office that had recommended budget cuts to the Department of Public Health, ***not*** the Board of Supervisors that had promulgated the reduction in healthcare services to the medically indigent. The pair's argument that a § 1442.5 Bielenson hearing is triggered only when budget cuts involving healthcare services to the medically indigent are originated by the Board … was tossed out by the Court!

I believe that, by extension, meeting agenda notices that do not ***substantially*** comply with statutes in the San Francisco Sunshine Ordinance (and alternatively, the Brown Act or CPRA) cannot be found by the SOTF to be merely technical violations if the deficient agenda notice does not provide the statutory objective of providing a fully informed notice. I recommend that the SOTF seek an opinion from its legal advisor, Deputy City Attorney Ernest Llorente, on this matter. The citations below, from *Smith v. Board of Supervisors*, can be found on FindLaw.com by searching for "Smith v. Board of Supervisors (1989) 216 Cal.App.3d 862."

Background

Before outlining why the SOTF's February 26 ruling was improper, background information is first necessary.

In *Smith v. Board of Supervisors*, the Court held that when a statute requires a "detailed" agenda notice, a notice that contains only "major ideas or concepts," is not sufficient.

The Court found that a May 27, 1988 Board of Supervisors Bielenson Hearing notice had not "substantially complied," with notice requirements specified in § 1442.5. The Court noted:

- "Substantial compliance will suffice if the purpose of the statute is satisfied (Downtown Palo Alto Comm. for Fair Assessment v. City Council (1986) 180 Cal.App.3d 384, 395 [225 Cal.Rptr. 559])
- "But substantial **[216 Cal.App.3d 875]** compliance means actual compliance in respect to that statutory purpose. (International Longshoremen's & Warehousemen's Union v. Board of Supervisors (1981) 116 Cal.App.3d 265, 273 [171 Cal.Rptr. 875].)
- "The doctrine of substantial compliance excuses technical imperfections only after the statutory objective has been achieved. (International Longshoremen's & Warehousemen's Union v. Board of Supervisors, supra, at p. 273.)"

The Court held that some technical violations could provide substantial compliance, noting several examples:

- "Substantial compliance has been found where a clerk merely failed to timely stamp an order for a new trial (Dersherow v. Rhodes (1969) 1 Cal.App.3d 733, 745 [82 Cal.Rptr. 138]);
- "Where there were typographical errors (Stasher v. Harger-Haldeman (1962) 58 Cal.2d 23, 29 [22 Cal.Rptr. 657, 372 P.2d 649]);
- "Harmless misstatements in a form contract (Stasher, supra);
- "Failure to notify all property owners of a property assessment hearing where most of the owners had been notified (Downtown Palo Alto Comm. for Fair Assessment v. City Council, supra, 180 Cal.App.3d 384, 396); and
- "Where the complaint failed to name a corporate defendant although the defendant knew it was being served (Cory v. Crocker National Bank (1981) 123 Cal.App.3d 665, 671-672 [177 Cal.Rptr. 150]). [7d]"

Then the Court ruled that San Francisco's 1988 Bielenson hearing notice in question:

- "Here, the statutory objective to provide for an informed public was not achieved by the May 27 notice. That notice was not merely technically imperfect; it was legally insufficient.
- "Here, [in the *Smith vs. Board of Supervisors* case], as in Ibarra (Ibarra v. City of Carson (1989) 214 Cal.App.3d 90 [262 Cal.Rptr. 485]) the statutory requirement of both timely and sufficient notice also serves to educate the public, in this case about the proposed **[216 Cal.App.3d 876]** reductions in health services; it also allows interested persons enough time to prepare presentations at the hearing. The timely but insufficient [Bielenson] notice of May 27 did not fulfill the purposes of the statute. Further, the issuance of an acceptable [replacement] notice on June 21 does not constitute compliance with the statute [because although statutorily sufficient, was untimely]."

The Court concluded:

- "As pointed out long ago, '[w]here [a] statute prescribes a certain kind of notice, a court is not justified in saying that some other kind of notice would be equally effective.' (Ferri v. City of Long Beach (1917) 176 Cal. 645, 647 [169 P. 385].)" This 1917 ruling has been in force for nearly a century of case law.

Discussion

In my complaint, I alleged that Sunshine Ordinance Section 67.8(a)(5) stipulates the format for closed meeting notices; Board of Supervisors agenda item 24 on its November 20 agenda wrongly failed to follow the format, since it did not state "CONFERENCE WITH NEGOTIATOR -- COLLECTIVE BARGAINING," and the phrase "Anticipated issue(s) under negotiation: Retiree Health Care Benefits," as required by the Sunshine Ordinance and CA Government Code 54957.6.

On February 26, the SOTF ruled that there had been a "technical violation" with the Board of Supervisors agenda description; the SOTF ruled in my favor, citing Section 67.10(e)(1) that the agenda notice had not "clearly identified the agenda item." But I had not complained that the agenda item had been insufficiently vague; I complained under Section 67.10(e)(1) that the board had entered into closed session in the absence of "prior to and during" active contract negotiations.

Alternatively, I had complained under Section 67.8(a)(5) that the format of the public notice required had been violated. Instead of considering and ruling on Section 67.8(a)(5), the Task Force ignored, completely, Section 67.8(a)(5), and instead introduced a motion to hear a technical violation under Section 67.10(e)(1) for failure to clearly identify the agenda item, of which I had not complained, since my complaint about 67.10(e)(1) alleged the Board had entered into closed session in the absence of "prior to and during" active contract negotiations.

The SOTF Faulty Logic on February 26

The Order of Determination regarding my complaint #07092 adopted by the SOTF on February 26 improperly stated:

> "The Sunshine Ordinance Task Force finds that the Board of Supervisors technically violated Section 67.10 (e)(1) of the Sunshine Ordinance for failing to clearly identify the agenda item."

I am indebted to James Chaffee for educating me on the distinctions between sections 67.8(a)(5) and 67.10(e)(1).

The reason that the SOTF's February 26 Order is improper is that Section 67.10 (e)(1) does not deal so much with deficient agendas as it does with notices of closed sessions, as described below.

The section of the Sunshine Ordinance stipulating notice requirements is 67.8(a)(5). It is very difficult to argue that providing the information in another form than that required by 67.8(a)(5) is substantial compliance, for a very simple reason: The previous version of the Sunshine Ordinance, before Prop G, specifically referenced that substantial compliance was sufficient. But when Prop G was adopted, that section was removed; therefore, notice requirements must be followed very specifically. It appears that the SOTF's February 26 Order was based on the pre-Prop G standard, not on post-Prop G language in the current Sunshine Ordinance.

Section 67.10(e)(1) involves the actual requirements for the closed session, not the agenda requirements for the closed session. A violation of this section constitutes an illegal meeting, not illegal notice of a legal meeting.

If a meeting is legal, but the notice was inadequate, that makes the meeting illegal in the sense that people were not adequately informed who had a right to be there and have full notice. While notice requirements are real and substantive, and cannot be dismissed as "technical violations," the problem could simply be cured by continuing the meeting until such time as an adequate notice is given. But a closed session that does not comply with 67.10(e)(1) is not a notice problem and cannot be corrected with a different notice. It is a meeting which is illegal at its core, because without compliance with notice requirements, there is no justification for invoking the closed session provisions.

What we have is the word "technical" being used in two different senses. One: "Technical" meaning noncompliance which has no material or substantial effect and, therefore, there was substantial compliance irrespective of the violation. And two: "Technical" loosely used to mean easily corrected and having no lasting effect.

But the question becomes: Is there any meaningful intellectual justification that can be used to pass this complaint off as "technical" in either sense of the term? The answer is, emphatically, No. In this case the notice requirements of 67.8(a)(5) are of the essence, because they didn't have the information to disclose that would have constituted the full disclosures required by closed session notice requirements. There was no on-going negotiation and no employee contract at issue — instead, the agenda notice stated they would be discussing a charter amendment. Following the formal requirements of 67.8(a)(5) would have served as an illustration of the fact that they were not in compliance. That is why the requirements are formal in nature.

But more to the point, under 67.10(e)(1) the Board of SUpervisors had no right to go into closed session. There is no way a violation of that section can be "technical," and no basis for the SOTF to have determined that it was merely a "technical" violation. The central point, is that the Board of Supervisors didn't provide a justification for the closed session, and without that justification, it was an inherently illegal closed session. When an illegal meeting is held, it can't be reduced, as the SOTF attempted to do, to the status of a mere technical violation.

Therefore, I continue to assert that the Board of Supervisors' failure to have used the required format under Section 67.8(a)(5) was a substantial violation of the Ordinance, not a mere technical violation, and that it deprived the public of its Right to Know what the true purpose of the Board's closed-door session on November 20, 2007 was about.

I also now belatedly assert that 67.8(a)(5) regarding the agenda notice requirements in Section 67.10(e)(1) for closed sessions, had not "clearly identified the agenda item," but for reasons the SOTF did not consider, including information presented above regarding the *Smith v. Board of Supervisors* case: That in the absence of certain kinds of notice requirements, the SOTF cannot rule, and is not justified in saying, that some other kind of notice was equally effective or equally acceptable, and, therefore, that only a "technical violation" had occurred.

Recommendations

1. I recommend that the SOTF cease and desist from the use of "technical violations" regarding agenda notice requirement violations, unless a given agenda mere contains a typographical error of some sort. But when an agenda does not meet the statutory requirements for agenda notices, the motion being voted on to result in an Order of Determination should not let City agencies off of the hook by dumbing down that substantial non-compliance had occurred by sugar coating the Order of Determination as only having found a "technical violation."

   This applies not only to agenda notices, but also to whether the SOTF should abandon claiming in other Orders of Determination that production of public records can be found to have involved only "technical" violations.

2. By extension, Sunshine complaints involving other sections of the Ordinance — for instance, violations in providing public records and meeting attendance — should also not be labeled "technical violations," if, in fact, substantial non-compliance has occurred. I do not believe this is within the discretionary authority of the Task Force, as I believe that the *Ferri v. City of Long Beach* case applies equally to SOTF members.

3. Finally, I recommend that the SOTF formally amend its administrative rules in writing to prohibit findings of "technical violations" — unless something like a typographical error is found in an agenda notice — so that successor SOTF members will have this issue clearly resolved to guide them in introducing future motions and for composing future Orders of Determination.

An adage has it: "The expression of one thing is the exclusion of another."

The SOTF should cease its practice of excluding — by excusing — legally insufficient agenda notices by expressing them as merely technically imperfect. City agencies violative of the Sunshine Ordinance should not be rewarded for legally insufficient agenda notices by the SOTF expressing such violations as mere technicalities, since doing so excludes the proper finding of substantial non-compliance with applicable Sunshine laws.

Remedies Sought

1. I expressly ask the SOTF to introduce a motion at its next regularly-scheduled meeting to:

   a. Uphold its previous 6-2 vote in my favor.

   b. Rescind the SOTF's improper use of the term "technical violation," by stating that an actual violation had occurred, and not just on technical grounds.

c. Issue a new Order of Determination expressly stating that a **substantial** violation of the Sunshine Ordinance had occurred under both Section 67.8(a)(5) and Section 67.10(e)(1), not just under Section 67.10(e)(1) for failure to clearly identify the agenda item. While the SOTF may have partially arrived at the right decision, it cited in its Order of Determination the wrong relevant citation, as the *Smith vs. Board of Supervisors* discussion, above, demonstrates.

2. In my November 17 Sunshine complaint, I also specifically asked that the Task Force to Order the Board of Supervisors to immediately release the required audio recording and any written summaries of the closed session discussions. The SOTF failed to even discuss this remedy on February 26, 2007, despite my having explicitly asked the SOTF to consider this remedy in my original complaint.

Why does the SOTF permit Complainants to submit precise remedies in formal Sunshine Complaints, only then to have the SOTF evade even discussing remedies being sought?

Respectfully submitted,

Patrick Monette-Shaw

cc: Ernest Llorente, Deputy City Attorney to the Sunshine Task Force
Angela Calvillo, Clerk of the Board, Board of Supervisors