

Date: April 26, 2011

Item No. 4 & 5
File No. 11013

SUNSHINE ORDINANCE TASK FORCE

AGENDA PACKET CONTENTS LIST*

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Completed by: Chris Rustom

Date: April 22, 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
E-MAIL: jerry.threet@sfgov.org

MEMORANDUM

April 20, 2011:

*PATRICK MONETTE-SHAW VS. CONTROLLER'S OFFICE (110013)*¹

COMPLAINT

THE COMPLAINANT ALLEGES THE FOLLOWING:

Complainant Patrick Monette-Shaw alleges that the San Francisco Controller violated the Ordinance by failing to provide records in response to his January 1, 2011 Immediate Disclosure Request ("IDR") for "any and all written correspondence between the City Controller's Office and the Ethics Commission related to the Whistleblower Complaint filed by Drs. Derek Kerr and Maria Rivero regarding the Laguna Honda Hospital Patient Gift fund during the period February 1, 2010 and December 31, 2010."

COMPLAINANT FILES COMPLAINT:

On March 6, 2011, Complainant filed a complaint with the Task Force alleging a violation of Sections 67.24, 67.26, and 67.34 of the Ordinance.

JURISDICTION

The Controller is a charter department under the Ordinance. The Task Force therefore generally has jurisdiction to hear a complaint against the Controller.

The Controller has previously argued to the Task Force that records related to an investigation under the Controller's Whistleblower Program, established by Charter Amendment and codified at Charter Section F1.100, *et seq.*, are confidential, and therefore the Task Force lacks jurisdiction to hear and adjudicate complaints regarding such records. While the Controller continues to argue this position, it did not contest jurisdiction in this matter based on the prior ruling of the Task Force that it had jurisdiction over a similar complaint. This memo will not address the jurisdictional issue because it is not contested in this matter.²

¹ Mr. Monette-Shaw also complains about the Ethics Commission in this same complaint, as well as a separate complaint. The Ethics Commission complaints are addressed in separate memoranda.

² This office has previously advised the Task Force, however, that where the Sunshine Ordinance is preempted by superior law, but the Public Record Act still applies, the Task Force lacks jurisdiction to hear solely a complaint of a violation of the PRA. See City Attorney Jurisdiction Letter and Instructional Memoranda for *Complaint 10052, Kai Wilson vs. North of*

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APPLICABLE STATUTORY SECTION(S):

S.F. Administrative Code Sections 67.24, 67.26, and 67.27.
SF Charter Sections F1.107, F1.110
Cal. Gov't Code Sections 6254(c), (k)
Evidence Code Section 1040

APPLICABLE CASE LAW:

See case law cited in analysis, below.

ISSUES TO BE DETERMINED**Uncontested/Contested Facts:***Complainants' Allegations*

On January 1, 2011, Mr. Monette-Shaw made an IDR through an email to Tonia Lediju, Monique Zmuda, and Elisa Sullivan of the Controller's Office for "any and all written correspondence between the City Controller's Office and the Ethics Commission related to the Whistleblower Complaint filed by Drs. Derek Kerr and Maria Rivero regarding the Laguna Honda Hospital Patient Gift fund during the period February 1, 2010 and December 31, 2010."

Mr. Monette-Shaw further alleges that on January 13, 2011, Nicholas Delgado of the Controller sent him an email with an attachment that purported to respond to his IDR. That attachment included a description of the Controller's Whistleblower Program, including a statement that the City Attorney had advised the Controller of its duty under Charter provisions establishing the program to maintain the confidentiality of the identity of whistleblowers. Further, the attached letter also included the following statement: "Section F1.110 [of the charter] expressly provides that all drafts, notes, preliminary reports of Controller's benchmark studies, audits, investigations, and other reports shall be confidential." Page 4 of this letter goes on to state that this confidentiality applies while the complaint is under investigation.

In another section of the same letter, the Controller stated that: 1) information gathered as a part of the whistleblower investigation is "official information" protected from disclosure as privileged by Evidence Code 1040, and 2) Gov't Code Section 6254(k) exempts from disclosure records covered by Evidence Code provisions establishing privileges against disclosure. The Controller further argues that this information is privileged under Evidence Code § 1040(b) because the public interest in confidentiality outweighs the public interest in disclosure. The Controller's letter appears to rest this conclusion on the public interest in protecting the identity of the whistleblower.

In another section of the same letter, the Controller states that confidentiality of information gathered as part of the whistleblower investigation also is justified under Gov't Code Section 6254(c) and under the California Constitution as an "unwarranted invasion of [the] personal privacy" of the persons accused of wrongdoing by a whistleblower. The Controller

Market/Tenderloin Community Benefit District. While the Task Force found that it had jurisdiction to hear that complaint, our advice on this issue has not changed.

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further argues that this information is protected from disclosure because the privacy interest in of the accused individuals accused outweighs the public interest in disclosure, citing *Brown v. City of Taft* (1994) 154 Cal.App.3d 332, 345-347. The Controller appears to qualify this statement later in the letter by adding that the privacy interest of the accused prevails only until complaints of a substantial nature are proven well-founded.

Mr. Monette-Shaw further alleges that on January 14, 2011, he sent another email to the Controller asking if the January 13, 2011 communication from Nicholas Delgado was stating that there was no correspondence responsive to his IDR. He further alleges that on January 21, 2011, the Controller responded to this request by stating that there routinely is correspondence between the Controller and Ethics over whistleblower complaints, but that it cannot confirm whether such correspondence exists with regard to the specific whistleblower complaint in question. This email response from the Controller further stated that any information that might identify any participant in the investigation process is treated as confidential and not disclosed, as all participants in the whistleblower process are provided the status of a whistleblower whose identities are protected.

Mr. Monette-Shaw further alleges that Tony Lediju of the Controller's Office elsewhere revealed that the Controller had referred the whistleblower complaint in question to Ethics for its investigation and had not conducted its own investigation of the complaint. These communications regarding the complaint were allegedly made by Ms. Lediju at a subcommittee meeting of the Health Commission on September 28, 2010 and December 3, 2010.

The Controller's Response

The Controller's April 20, 2011 response to this complaint states that it responded to Mr. Monette-Shaw's January 1, 2011 IDR by providing him with a document that generally "explained the City's Whistleblower Program and its confidentiality provisions, and declined to produce further documents." The Controller further argues that both state and local law provide that it may release its audit report, but must keep any further documentation related to a whistleblower complaint confidential. The Controller explains that, in its view, any communication between the Controller and Ethics concerning the whistleblower complaint remained a confidential part of the Controller's investigation because the investigations of the two agencies "involved overlapping issues." Finally, the Controller argues that the confidentiality required under state and local law depends in no way on whether the complainant consents to disclosure of the whistleblower complaint. The Controller cites to the following laws as justifying withholding the records on the basis of confidentiality: Charter Section F1.110(b); S.F. Campaign and Governmental Conduct Code Section 4.123; California Government Code Section 53087.6; Evidence Code Section 1040; Government Code Section 6254(c); and the California Constitution, Article I (right to privacy).

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LEGAL ISSUES/LEGAL DETERMINATIONS:

- Does section F1.110(b) of the Charter exempt from disclosure under the Sunshine Ordinance correspondence between Ethics and the Controller related to an investigation by the Controller of a whistleblower complaint filed with both agencies?
- Are the documents requested from the Controller **required** to be provided under the Public Records Act?
- Do the documents withheld from disclosure by the Controller constitute "official information" under Evidence Code Section 1040?
- Are documents which constitute "official information" under Evidence Code Section 1040 exempted from disclosure by Gov't Code Sections 6254(k), 6276, and 6276.32?
- If so, does that exemption exist only while an investigation by the Controller remains open?
- Are records of an "investigative audit" under California Government Code Section 53087.6 confidential and therefore exempt from disclosure under Government Code Section 6254(k)?
- Does Gov't Code Section 6254(c) allow the withholding by the Controller of information regarding persons accused of wrongdoing by a whistleblower complaint?
- If so, does that exemption end upon a finding that a complaint of a substantial nature was well-founded?

SUGGESTED ANALYSIS*San Francisco Charter*

Section F1.110(b) of the Charter provides in relevant part: "Notwithstanding any other provision of this Charter, or any ordinance or regulation of the City and County of San Francisco, and except to extent required by state or federal law, all drafts, notes, preliminary reports of Controller's benchmark studies, audits, investigations and other reports shall be confidential." As a Charter provision, this section overrides the Sunshine Ordinance. . . By its express terms, Section F1.110(b) makes "drafts, notes, preliminary reports of Controller's . . . investigations . . . confidential" "[n]otwithstanding any other . . . ordinance . . . of the City and County of San Francisco." This includes the Sunshine Ordinance, which Section F1.110(b) unequivocally overrides with respect to "drafts, notes [and] preliminary reports" of "investigations" except to the extent federal or state law require that such documents be released.

Section F1.107(c) of the Charter also requires the Board of Supervisors to "enact and maintain an ordinance protecting the confidentiality of whistleblowers, and protecting City officers and employees from retaliation for filing a complaint with, or providing information to, the Controller . . . about improper government activity by City officers and employees." Section F1.107 and the provision of the San Francisco Campaign and Governmental Conduct Code enacted to implement it thus make the identity of whistleblowers and City officers and employees who file a complaint with or provide information to the Controller confidential. Specifically, Section 4.123(a) of the Campaign and Governmental Conduct Code requires that employees and officers of the City keep confidential "[t]he identity of any person who makes a complaint to the Whistleblower Program under Section 4.107 of this Chapter, and any information that would lead to the disclosure of the person's identity, unless the person who

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made the complaint provides written authorization for the disclosure" and "[c]omplaints or reports to the Whistleblower Program and information related to the investigation of the matter, including drafts, notes, preliminary reports, working papers, records of interviews, communications with complainants and witnesses, and any other materials and information gathered or prepared in the course of the investigation." Moreover subsection (b) of section 4.107 prohibits "[c]ity officers and employees" from "us[ing] any City resources, including work time, to ascertain or attempt to ascertain directly or indirectly the identity of any person who has made a complaint to the Whistleblower Program, unless such person has provided written authorization for the disclosure." The only exception to these provisions that may be pertinent here provides that the Controller may release "information to inform the public of the nature of the actions taken by the Controller in the operation of the Whistleblower Program provided that information is prepared so as to protect the confidentiality of persons making complaints and of investigations."

These provisions of the Charter and the legislation implementing the Charter generally prohibit disclosure of information about whistleblower complaints and investigations by the Controller of such complaints except to the extent federal or state law requires their disclosure.

Public Records Acts Exemptions

Our office is unaware of any federal law provision that would require records relating to whistleblower complaints and investigations to be made public. Whether the Charter section exempts the documents from disclosure thus turns on whether state law requires disclosure of such records. The only state law of which we are aware that could require such disclosure is the Public Records Act. The PRA makes most government documents public, with certain exemptions.

If the investigatory records of the Controller fall within an exemption to the PRA, the Controller may -- and pursuant to the above described Charter sections **must** -- withhold such records. If no PRA exemption applies, the record is not subject to the confidentiality imposed by the Charter and must be disclosed.

Sections 6276 and 6276.32 of the PRA specifically provide that documents that constitute "official information" are exempt from disclosure as public records. Section 6276.32 in turn refers to Evidence Code Section 1040, which defines "official information" to mean information "acquired in confidence by a public employee in the course of his or her duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made."

Unless disclosure of a record is prohibited by federal or state law, Section 1040 (b) provides a conditional privilege that may be asserted only when disclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice; . . ." The agency applies a balancing test that weighs the necessity for disclosure "in the interests of justice" against the "necessity for preserving the confidentiality of the information." The voters apparently engaged in that balancing when they enacted Charter Sections F1.107 and F1.110. One can infer that they decided confidentiality of whistleblower investigations was important to

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encourage whistleblowers and other witnesses, including city employees and officials, to come forward and provide information about possible violations, to encourage candor by employees and officials accused of misconduct, and to protect accused employees and officials from the injury that might result from premature publication of unexamined and possibly unwarranted complaints. In these ways, confidentiality facilitates the evaluation process that enables the Controller to determine whether there is or may have been a violation of law and to investigate or refer the matter to another city agency for investigation, prosecution and redress.

Also, the Controller has argued that Gov't Code Section 53087.6 makes confidential records of an "investigative audit" except for a "report of an investigation" which may contain "findings resulting from a completed investigation that are deemed necessary to serve the interests of the public." The Controller asserts that it conducted such an investigative audit and that the information it released to the public was all that was required under this statute. Further, Government Code Section 5264(k) exempts from disclosure "records, the disclosure of which is exempted or prohibited pursuant to [] state law[.]" Records of an investigative audit made confidential by Government Code Section 53087.6 are therefore exempt from disclosure under the PRA.

In addition, the Controller has asserted that Gov't Code Section 6254(K) exempts records of whistleblower investigations where they would reveal the identity of the accused subjects of a whistleblower complaint. Citing *American Federation of State etc. Employees v. Regents of University of California* (1978) 80 Cal.App.3d 913, the Controller further asserts that those accused of whistleblower violations are entitled to privacy protections against disclosure unless and until "complaints of a substantial nature are proven well-founded." That case actually held that a government agency may, under Gov't Code § 6494(c), withhold records related to complaints of wrongdoing against government employees unless the allegations are found *after investigation* to be of a "substantial nature" and there is "reasonable cause to believe the complaint is well-founded." *Id.*, 80 Cal.App.3d at 919. As that case reveals, a decision on whether the agency was justified in withholding such records may depend on an *in camera* review of the records, a procedure available through a court action brought under the Public Records Act.

Sunshine Ordinance Provisions

There is some question whether Sunshine Ordinance sections 67.24(g) and (i) would in general prohibit invocation of the exemptions set forth in section 6254 of the Public Records Act and relied on by the Controller. However, insofar as the Sunshine Ordinance would require disclosure regardless of state law, it is preempted by the Charter. Under the Charter sections, release of the requested information is permissible only if state or federal law *requires* disclosure. Only in that circumstance are the documents and information outside the confidentiality imposed by Charter sections F1.110(b) and F1.107(a).

Put simply, if the Controller were prohibited by the Sunshine Ordinance from withholding documents related to its investigation of whistleblower complaints, this would have the effect of eviscerating the confidentiality provisions of the Charter sections establishing confidentiality with respect to investigations. Where an ordinance and the Charter are in conflict,

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the Charter must prevail. *City and County of San Francisco v. Patterson* (1988) 202 Cal.App.3d 95, 102-103. The Controller therefore cannot be prohibited by the Sunshine Ordinance from asserting this exemption, if it is otherwise available and not prohibited by state or federal law.³

Summary

In conclusion, the central issue before the Task Force is whether state law requires the disclosure of the records requested from the Controller. If state law requires disclosure, the Charter may not make them confidential and they must be produced to complainant. If, however, state law allows them to be withheld, then the Charter makes them confidential and allows withholding, regardless of what the Sunshine Ordinance would otherwise require.⁴

CONCLUSION

THE TASK FORCE FINDS THE FOLLOWING FACTS TO BE TRUE:

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

³ In connection with a similar, earlier complaint against the Controller, the question was raised as to whether the City's Charter could preempt the Sunshine Ordinance, since section 67.36 of the Ordinance states that it "supersedes other local law." First, as explained above, the charter always take precedent over conflicting ordinances, even those that were passed by initiative. (The Charter also was passed by a vote of the electorate.) Moreover, even though the Public Records Act allows localities to adopt more stringent requirements than those included in the state law, this in no way conveys to those locally adopted laws the imprimatur of state precedence over local charters. Local ordinances remain subject to the control of local charters.

⁴ Mr. Monette-Shaw makes repeated reference to the Petition for Writ of Mandate and related pleadings filed in *Grossman v. San Francisco Ethics Commission, et al.*, San Francisco Superior Court Case No. CPF-09-509868. That case was settled by the City in part by providing Mr. Grossman access to Ethics investigation files related to referrals by the Sunshine Task Force of Orders of Determination to Ethics for enforcement action. However, that case dealt with Ethics' investigation files related to Sunshine referrals, which Mr. Grossman's lawsuit correctly distinguished from *other* investigative files of Ethics. Mr. Grossman conceded that other investigative files remained confidential under the confidentiality provisions of Charter Appendix C3.699-10. The complaint currently before the Task Force deals with the investigative files of the Controller, which are directly governed by Charter sections F1.110(b) and F1.107(a) and its implementing legislation. The Grossman pleadings therefore have little, if any, bearing on this complaint.

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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.**

- (a) Every person having custody of any public record or public information, as defined herein, (hereinafter referred to as a custodian of a public record) shall, at normal times and during normal and reasonable hours of operation, without unreasonable delay, and without requiring an appointment, permit the public record, or any segregable portion of a record, to be inspected and examined by any person and shall furnish one copy thereof upon payment of a reasonable copying charge, not to exceed the lesser of the actual cost or ten cents per page.
- (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.
- (c) A *custodian of a public record* 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). A custodian of any public record, when not in possession of the record requested, shall assist a requester in directing a request to the proper office or staff person.
- (d) If the custodian refuses, fails to comply, or incompletely complies with a request described in (b), the person making the request may petition the *supervisor of records* for a determination whether the record requested is public. The supervisor of records shall inform the petitioner, as soon as possible and within 10 days, of its determination whether the record requested, or any part of the record requested, is public. Where requested by the petition, and where otherwise desirable, this determination shall be in writing. Upon the determination by the supervisor of records that the record is public, the supervisor of records shall immediately order the custodian of the public record to comply with the person's request. If the custodian refuses or fails to comply with any such order within 5 days, the supervisor of records shall notify the district attorney or the attorney general who shall take whatever measures she or he deems necessary and appropriate to insure compliance with the provisions of this ordinance.
- (e) If the custodian refuses, fails to comply, or incompletely complies with a request described in (b) above or if a petition is denied or not acted on by the supervisor of public records, the person making the request may petition the Sunshine Task Force for a determination whether the record requested is public. The Sunshine Task Force shall inform the petitioner, as soon as possible and within 2 days after its next meeting but in no case later than 45 days from when a petition in writing is received, of its determination whether the record requested, or any part of

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the record requested, is public. Where requested by the petition, and where otherwise desirable, this determination shall be in writing. Upon the determination that the record is public, the Sunshine Task Force shall immediately order the custodian of the public record to comply with the person's request. If the custodian refuses or fails to comply with any such order within 5 days, the Sunshine Task Force shall notify the district attorney or the attorney general who may take whatever measures she or he deems necessary to insure compliance with the provisions of this ordinance. The Board of Supervisors and the City Attorney's office shall provide sufficient staff and resources to allow the Sunshine Task Force to fulfill its duties under this provision. Where requested by the petition, the Sunshine Task Force may conduct a public hearing concerning the records request denial. An authorized representative of the custodian of the public records requested shall attend any hearing and explain the basis for its decision to withhold the records requested.

SEC. 67.24. PUBLIC INFORMATION THAT MUST BE DISCLOSED.

Notwithstanding a department's legal discretion to withhold certain information under the California Public Records Act, the following policies shall govern specific types of documents and information and shall provide enhanced rights of public access to information and records:

- . . .
- (g) Neither the City nor any office, employee, or agent thereof may assert California Public Records Act Section 6255 or any similar provision as the basis for withholding any documents or information requested under this ordinance.
 - (h) Neither the City nor any office, employee, or agent thereof may assert an exemption for withholding for any document or information based on a "deliberative process" exemption, either as provided by California Public Records Act Section 6255 or any other provision of law that does not prohibit disclosure.
 - (i) Neither the City, nor any office, employee, or agent thereof, may assert an exemption for withholding for any document or information based on a finding or showing that the public interest in withholding the information outweighs the public interest in disclosure. All withholdings of documents or information must be based on an express provision of this ordinance providing for withholding of the specific type of information in question or on an express and specific exemption provided by California Public Records Act that is not forbidden by this ordinance.

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.

SAN FRANCISCO CHARTER**§ F1.107. - CITIZENS' COMPLAINTS; WHISTLEBLOWERS.**

(c) The Board of Supervisors shall enact and maintain an ordinance protecting the confidentiality of whistleblowers, and protecting City officers and employees from retaliation for filing a complaint with, or providing information to, the Controller, Ethics Commission, District Attorney, City Attorney or a City department or commission about improper government activity by City officers and employees.

F1.110. - ACCESS TO RECORDS; PRELIMINARY REPORTS.

(b) Notwithstanding any other provision of this Charter, or any ordinance or regulation of the City and County of San Francisco, and except to the extent required by state or federal law, all drafts, notes, preliminary reports of Controller's benchmark studies, audits, investigations and other reports shall be confidential.

SAN FRANCISCO CAMPAIGN AND GOVERNMENTAL CONDUCT CODE**SEC. 4.120. - CONFIDENTIALITY.**

(a) **WHISTLEBLOWER IDENTITY.** Any individual who files a complaint under Section 4.105 of this Chapter may elect to have his or her identity kept confidential as provided by Charter Section C3.699-13(a). Such election must be made at the time the complaint is filed.

(b) **COMPLAINTS AND INVESTIGATIONS.** The Ethics Commission shall treat as confidential complaints made under Section 4.105 of this Chapter, and related information, including but not limited to materials gathered and prepared in the course of investigation of such complaints, and deliberations regarding such complaints, as provided by Charter Section C3.699-13(a).

(c) **EXCEPTIONS.**

(i) **Conduct of Investigations.** Nothing in this Section shall preclude the Ethics Commission from disclosing the identity of an individual or other information to the extent necessary to conduct its investigation.

(ii) **Referrals.** Nothing in this Section shall preclude the Ethics Commission from referring any matter to any other City department, commission, board, officer or employee, or to other government agencies for investigation and possible disciplinary or enforcement action.

(Added by Ord. 71-00, File No. 000358, App. 4/28/2000)

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SEC. 4.123. - CONFIDENTIALITY PROTECTION FOR WHISTLEBLOWER PROGRAM COMPLAINANTS AND INVESTIGATIONS.

(a) WHISTLEBLOWER IDENTITY AND INVESTIGATIONS. Every officer and employee of the City shall keep confidential: Controller

(i) The identity of any person who makes a complaint to the Whistleblower Program under Section 4.107 of this Chapter, and any information that would lead to the disclosure of the person's identity, unless the person who made the complaint provides written authorization for the disclosure.

(ii) Complaints or reports to the Whistleblower Program and information related to the investigation of the matter, including drafts, notes, preliminary reports, working papers, records of interviews, communications with complainants and witnesses, and any other materials and information gathered or prepared in the course of the investigation.

The protection of confidentiality set forth in this Section applies irrespective of whether the information was provided in writing and whether the information was provided or is maintained in electronic, digital, paper or any other form or medium.

(b) INQUIRY REGARDING IDENTITY PROHIBITED. In order to assure effective implementation of the provisions of this Section providing confidentiality to whistleblowers, City officers and employees may not use any City resources, including work time, to ascertain or attempt to ascertain directly or indirectly the identity of any person who has made a complaint to the Whistleblower Program, unless such person has provided written authorization for the disclosure. Nothing in this Section shall preclude an officer or employee assigned to investigate a complaint under this Chapter from ascertaining the identity of a complainant to the extent necessary to conduct the investigation.

(c) EXCEPTIONS. Nothing in this Section shall preclude the Controller from (i) disclosing the identity of a person or other information to the extent necessary to conduct a civil or criminal investigation or to take any enforcement action, including any action to discipline an employee or take remedial action against a contractor, or (ii) releasing information as part of a referral when referring any matter to another City department, commission, board, officer or employee, or to other governmental agencies, for investigation and possible disciplinary, enforcement or remedial action, or (iii) releasing information to the Citizens Audit Review Board so that it may carry out its duty to provide advisory input to the Controller on the Whistleblower Program, provided that information is prepared so as to protect the confidentiality of persons making complaints and of investigations, or (iv) releasing information to inform the public of the nature of the actions taken by the Controller in the operation of the Whistleblower Program provided that information is prepared so as to protect the confidentiality of persons making complaints and of investigations.

CAL. GOV'T CODE §§ 6250 et seq. (Public Records Act)

§ 6254. EXEMPTION OF PARTICULAR RECORDS

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(k) 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.

§ 6255. JUSTIFICATION FOR WITHHOLDING OF RECORDS

(a) The agency shall justify withholding any record by demonstrating that the record in question is exempt under express provisions of this chapter or that on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record.

ARTICLE 2. OTHER EXEMPTIONS FROM DISCLOSURE**III. § 6275. LEGISLATIVE INTENT; EFFECT OF LISTING IN ARTICLE**

It is the intent of the Legislature to assist members of the public and state and local agencies in identifying exemptions to the California Public Records Act. It is the intent of the Legislature that, after January 1, 1999, each addition or amendment to a statute that exempts any information contained in a public record from disclosure pursuant to subdivision (k) of Section 6254 shall be listed and described in this article. The statutes listed in this article may operate to exempt certain records, or portions thereof, from disclosure. The statutes listed and described may not be inclusive of all exemptions. The listing of a statute in this article does not itself create an exemption. Requesters of public records and public agencies are cautioned to review the applicable statute to determine the extent to which the statute, in light of the circumstances surrounding the request, exempts public records from disclosure.

JJJ. § 6276. RECORDS OR INFORMATION NOT REQUIRED TO BE DISCLOSED

Records or information not required to be disclosed pursuant to subdivision (k) of Section 6254 may include, but shall not be limited to, records or information identified in statutes listed in this article.

§ 6276.32. "NARCOTIC ADDICT OUTPATIENT REVOCATION PROCEEDING" TO "OSTEOPATHIC PHYSICIAN AND SURGEON"

. . .

Official information acquired in confidence by public employee, disclosure of, Sections 1040 and 1041, Evidence Code.

CAL. EVIDENCE CODE**SECTION 1040. OFFICIAL INFORMATION**

(a) As used in this section, "official information" means information acquired in confidence by a public employee in the course of his or her duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made.

(b) A public entity has a privilege to refuse to disclose official information, and to prevent another from disclosing official information, if the privilege is claimed by a person authorized by the public entity to do so and:

(1) Disclosure is forbidden by an act of the Congress of the United States or a statute of this state; or

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(2) Disclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice; but no privilege may be claimed under this paragraph if any person authorized to do so has consented that the information be disclosed in the proceeding. In determining whether disclosure of the information is against the public interest, the interest of the public entity as a party in the outcome of the proceeding may not be considered.



DENNIS J. HERRERA
City Attorney

JERRY THREET
Deputy City Attorney

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

MEMORANDUM

April 20, 2011:

PATRICK MONETTE-SHAW VS. ETHICS COMMISSION (110013)¹

COMPLAINT

THE COMPLAINANT ALLEGES THE FOLLOWING:

Complainant Patrick Monette-Shaw alleges that the San Francisco Ethics Commission ("Ethics") violated the Ordinance by failing to provide records in response to his February 6, 2011 Immediate Disclosure Request ("IDR") for "[a]ny and all written correspondence between the Ethics Commission and the City Controller's Office (including the City Controller, the City Services Auditor, and/or the Controller's Whistleblower Program) regarding . . . Drs. Derek Kerr and Maria Rivero['s] complaint with the Ethics Commission regarding the LHH patient gift fund."

COMPLAINANT FILES COMPLAINT:

On March 6, 2011, Complainant filed a complaint with the Task Force alleging a violation of Sections 67.24, 67.26, and 67.34 of the Ordinance.

JURISDICTION

Ethics is a charter department under the Ordinance. The Task Force therefore generally has jurisdiction to hear a complaint against Ethics.

Although Ethics responded to the Complaint in a letter dated March 23, 2001, it did not contest jurisdiction of the Task Force in that response.

APPLICABLE STATUTORY SECTION(S):

S.F. Administrative Code Sections 67.24, 67.26, and 67.27.
SF Charter Appendix C3.699-13(a)
Cal. Gov't Code Sections 6254(c), (k)
Evidence Code Section 1040

¹ Mr. Monette-Shaw also complains about the Controller's Office in this same complaint. The Controller complaint is addressed in a separate memorandum. Although Mr. Monette-Shaw also requested investigative files related to this whistleblower complaint from Ethics in this same IDR, those records are the subject of a separate complaint that is separately analyzed in another memo.

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APPLICABLE CASE LAW:

See case law cited in analysis, below.

ISSUES TO BE DETERMINED**Uncontested/Contested Facts:***Complainants' Allegations*

On January 1, 2011, Mr. Monette-Shaw made an IDR to Ethics through an email to John St. Croix, Garret Chatsfield, and Richard Mo for "[a]ny and all written correspondence between the Ethics Commission and the City Controller's Office (including the City Controller, the City Services Auditor, and/or the Controller's Whistleblower Program) regarding . . . Drs. Derek Kerr and Maria Rivero[s] complaint with the Ethics Commission regarding the LHH patient gift fund."

Mr. Monette-Shaw further alleges that on February 8, 2011, Steven Massey of Ethics sent him an email to respond to his IDR that included the following statement: "Under San Francisco Charter, Appendix C3.699-13(a), all Ethics Commission investigations 'shall be conducted in a confidential manner. Records of any investigation shall be considered confidential information to the extent permitted by state law.'" The email therefore declined to produce the requested records.

Ethic's Response

In a letter dated March 23, 2011, by Richard Mo, Ethics responds to this complaint. Mr. Mo does not disclose whether the requested records exist, but does argue that Ethics is not required to disclose the requested records. In that letter, Ethics repeats the earlier assertion by Mr. Massey that disclosure of information about an investigation is forbidden by Charter Appendix C3.699-13(a). Ethics states that this provision also makes the unauthorized release of such confidential information "sufficient grounds for the termination of the employee of the removal of the commissioner responsible for such release." Finally, Ethics' letter states that its regulations enacting these charter sections provide that, prior to a probable cause determination by the Commission on a complaint, "no complaint . . . investigative file or information . . . or Commissioner and staff deliberations about complaints shall be disclosed except as necessary to the conduct of an investigation."

LEGAL ISSUES/LEGAL DETERMINATIONS:

- Does Appendix C3.699-13(a) of the Charter exempt from disclosure under the Sunshine Ordinance correspondence between Ethics and the Controller related to an investigation by Ethics of a whistleblower complaint filed with both agencies?
- Are the documents requested from Ethics **required** to be provided under the Public Records Act?
- Are documents which constitute "official information" under Evidence Code Section 1040 exempted from disclosure by Gov't Code Sections 6254(k), 6276, and 6276.32?
- If so, does that exemption exist only while an investigation by Ethics remains open?

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- Does Gov't Code Section 6254(c) allow the withholding by Ethics of information regarding persons accused of wrongdoing by a whistleblower complaint?
- If so, does that exemption end upon a finding that a complaint of a substantial nature was well-founded?

SUGGESTED ANALYSIS*San Francisco Charter*

Appendix C3.699-13(a) of the Charter provides in relevant part: "If the commission . . . determines that there is sufficient cause to conduct an investigation, it shall investigate alleged violations of this charter or City ordinances relating to . . . conflicts of interest and governmental ethics. [] The investigation shall be conducted in a confidential manner. ***Records of any investigation shall be considered confidential information to the extent permitted by state law.*** Any member or employee of the commission or other person who, prior to a determination concerning probable cause, discloses information about any preliminary investigation, except as necessary to conduct the investigation, shall be deemed guilty of official misconduct. The unauthorized release of confidential information shall be sufficient grounds for the termination of the employee or removal of the commissioner responsible for such release."

As a Charter provision, Appendix C3.699-13(a) overrides the Sunshine Ordinance to the extent the two are in conflict. However, Section 67.27 of the Sunshine Ordinance allows for "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, [or for] ***withholding on the basis that disclosure is prohibited by law, . . . [citing] the specific statutory authority.***" Assuming the documents sought here fall within the category specifically protected by Charter Appendix C3.699-13(a), i.e., "***[r]ecords of any investigation***" related to "alleged violations of this charter or City ordinances relating to . . . conflicts of interest and governmental ethics",² the question arises whether the City could by Charter make them confidential and therefore exempt from disclosure under state law.

² Mr. Monette-Shaw suggests in his Sunshine complaint that the "whistleblower complaint" about which he seeks records does not allege "violations of [the] charter and City ordinances relating to [] ***conflicts of interest and governmental ethics.***" This argument lacks merit. Whistleblower complaints *by definition* allege violations "relating to [] conflicts of interest and governmental ethics." Charter Appendix C3.699-13(a). In a lawsuit filed against the City, this particular whistleblower complaint is described by Dr. Kerr himself as "alleging [] financial *conflicts of interest* and improper compensation of Department of Public Health officers and employees directed at certain individuals who were providing services for the City and at City expense." [emphasis added] See Complaint for Damages, p. 2, ¶ 9; *Kerr v. CCSF, et al.*, S.F. Sup. Ct. No. CGC-10-505443. The whistleblower complaint alleges conflicts of interest, which are expressly covered by Charter Appendix C3.699-13. Charter Appendix C3.699-13 also covers any investigation of alleged violations of local laws related to "governmental ethics," a broad phrase that would appear to cover any allegation that decisions by government employees

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Public Records Acts Exemptions

The Public Records Act (PRA) is a state statute. It thus generally preempts local law,³ including charter provisions, to the extent there is a conflict between the two. SF Charter Appendix C3.699-13(a) effectively recognizes this, making records relating to investigations confidential only "to the extent permitted by state law." There is thus no conflict between the Charter and the PRA, and whether an investigatory record is confidential under the Charter depends on whether it is exempt from disclosure under the PRA.

The documents in question would appear to be "public records" as that term is defined by the PRA. Under the PRA, a public record must be disclosed on request unless it falls within an exemption from disclosure. If the investigatory records of Ethics fall within an exemption to the PRA, Ethics may -- and indeed must -- withhold such information. If no PRA exemption applies, the record is not subject to the confidentiality imposed by the Charter and must be disclosed..

Sections 6276 and 6276.32 of the PRA specifically provide that documents that constitute "official information" are exempt from disclosure as public records. Section 6276.32 in turn refers to Evidence Code Section 1040, which defines "official information" to mean information "acquired in confidence by a public employee in the course of his or her duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made." Unless disclosure of a record is prohibited by federal or state law, Section 1040 (b) provides a conditional privilege that may be asserted only when disclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice; []." The agency applies a balancing test that weighs the necessity for disclosure "in the interests of justice" against the "necessity for preserving the confidentiality of the information." The voters apparently engaged in that balancing when they enacted the Charter provision. One can infer that they decided confidentiality of Ethics investigations was important to encourage whistleblowers and other witnesses to come forward and provide information about possible violations, to encourage candor by employees and officials accused of misconduct, and to protect accused employees and officials from the injury that might result from premature publication of unexamined and possibly unwarranted complaints. In these ways, confidentiality facilitates the fact finding process that enables Ethics to evaluate fully and fairly whether there has been a violation of the laws governing campaign finance and ethical conduct and ultimately to prosecute and redress such violations when appropriate.

were made under the sway of improper influences, rather than with the public good in mind. The whistleblower complaint at issue here concerns complaints of conduct claimed to be unethical, bringing the investigation within Charter Appendix C3.699-13.

³ If the confidentiality of records about a local investigation into violations of local laws were held to be a municipal affair and not a matter of statewide concern, there would be no preemption. It is not necessary to address this exception to preemption here because the matter can be resolved without doing so.

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In addition, Gov't Code Section 6254(c) exempts records of whistleblower investigations where they would reveal the identity of the accused subjects of a whistleblower complaint. See *American Federation of State etc. Employees v. Regents of University of California* (1978) 80 Cal.App.3d 913. Under case law, a government agency may, under Gov't Code § 6494(c), withhold records related to complaints of wrongdoing against government employees unless the allegations are of a "substantial nature" and there is "reasonable cause to believe the complaint is well-founded." *Id.*, 80 Cal.App.3d at 919. As that case reveals, a decision on whether the agency was justified in withholding such records may depend on an *in camera* review of the records, a procedure available through a court action brought under the Public Records Act.

Sunshine Ordinance Provisions

There is some question whether Sunshine Ordinance sections 67.24(g) and (i) would prohibit invocation of the exemptions set forth in section 6254 of the Public Records Act discussed above in circumstances where there was no Charter section. However, the Charter section preempts the Sunshine Ordinance and under the Charter section the inquiry is simply whether state law *allows* withholding. Only if it does *not* is the document outside the confidentiality mandated by Charter Appendix C3.699-13(a). Insofar as the Sunshine Ordinance would require disclosure regardless of state law, it is preempted by the Charter.

Put simply, if Ethics were prohibited by the Sunshine Ordinance from withholding documents related to its investigation of such complaints, this would have the effect of eviscerating the confidentiality provisions of the Charter sections with respect to investigations. Where an ordinance and the Charter are in conflict, the Charter must prevail. *City and County of San Francisco v. Patterson* (1988) 202 Cal.App.3d 95, 102-103. Ethics therefore cannot be prohibited by the Sunshine Ordinance from asserting confidentiality, if it is otherwise allowable under state law exemptions.⁴

Summary

In conclusion, the central issue before the Task Force is whether state law conflicts with the charter's provision making records of investigations confidential. If state law requires disclosure, the charter may not make them confidential and they must be produced to complainant. If, however, state law allows them to be withheld, then the Charter makes them

⁴ In connection with a similar, earlier complaint against the Controller, the question was raised as to whether the City's Charter could preempt the Sunshine Ordinance, since section 67.36 of the Ordinance states that it "supersedes other local law." First, as explained above, the charter always take precedence over conflicting ordinances, even those that were passed by initiative. (The Charter also was passed by a vote of the electorate.) Moreover, even though the Public Records Act allows localities to adopt more stringent requirements than those included in the state law, this does not mean a local public records law that is enacted as an ordinance takes precedence over the local charter.

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confidential and allows withholding, regardless of what the Sunshine Ordinance would otherwise require.⁵

CONCLUSION

THE TASK FORCE FINDS THE FOLLOWING FACTS TO BE TRUE:

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.**

(a) Every person having custody of any public record or public information, as defined herein, (hereinafter referred to as a custodian of a public record) shall, at normal times and during normal and reasonable hours of operation, without unreasonable delay, and without requiring an appointment, permit the public record, or any segregable portion of a record, to be inspected and examined by any person and shall furnish one copy thereof upon payment of a reasonable copying charge, not to exceed the lesser of the actual cost or ten cents per page.

(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

⁵ Mr. Monette-Shaw makes repeated reference in his complaint to the Petition for Writ of Mandate and related pleadings filed in *Grossman v. San Francisco Ethics Commission, et al.*, San Francisco Superior Court Case No. CPF-09-509868. That case was settled by the City in part by providing Mr. Grossman access to Ethics investigation files related to referrals by the Sunshine Task Force of Orders of Determination to Ethics for enforcement action. However, that case dealt with Ethics' investigation files related to Sunshine referrals, which Mr. Grossman's lawsuit correctly distinguished from *other* investigative files of Ethics. Those *other* investigative files, "relating to campaign finance, lobbying, conflicts of interest and government ethics," are indeed the type involved in the complaint currently before the Task Force. They are therefore directly governed by the confidentiality provisions of Charter Appendix C3.699-10. The Grossman pleadings therefore have little, if any, bearing on the instant complaint.

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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.

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

(d) If the custodian refuses, fails to comply, or incompletely complies with a request described in (b), the person making the request may petition the *supervisor of records* for a determination whether the record requested is public. The supervisor of records shall inform the petitioner, as soon as possible and within 10 days, of its determination whether the record requested, or any part of the record requested, is public. Where requested by the petition, and where otherwise desirable, this determination shall be in writing. Upon the determination by the supervisor of records that the record is public, the supervisor of records shall immediately order the custodian of the public record to comply with the person's request. If the custodian refuses or fails to comply with any such order within 5 days, the supervisor of records shall notify the district attorney or the attorney general who shall take whatever measures she or he deems necessary and appropriate to insure compliance with the provisions of this ordinance.

(e) If the custodian refuses, fails to comply, or incompletely complies with a request described in (b) above or if a petition is denied or not acted on by the supervisor of public records, the person making the request may petition the Sunshine Task Force for a determination whether the record requested is public. The Sunshine Task Force shall inform the petitioner, as soon as possible and within 2 days after its next meeting but in no case later than 45 days from when a petition in writing is received, of its determination whether the record requested, or any part of the record requested, is public. Where requested by the petition, and where otherwise desirable, this determination shall be in writing. Upon the determination that the record is public, the Sunshine Task Force shall immediately order the custodian of the public record to comply with the person's request. If the custodian refuses or fails to comply with any such order within 5 days, the Sunshine Task Force shall notify the district attorney or the attorney general who may take whatever measures she or he deems necessary to insure compliance with the provisions of this ordinance. The Board of Supervisors and the City Attorney's office shall provide sufficient staff and resources to allow the Sunshine Task Force to fulfill its duties under this provision. Where requested by the petition, the Sunshine Task Force may conduct a public hearing concerning the records request denial. An authorized representative of the custodian of the public records requested shall attend any hearing and explain the basis for its decision to withhold the records requested.

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SEC. 67.24. PUBLIC INFORMATION THAT MUST BE DISCLOSED.

Notwithstanding a department's legal discretion to withhold certain information under the California Public Records Act, the following policies shall govern specific types of documents and information and shall provide enhanced rights of public access to information and records:

. . .

(g) Neither the City nor any office, employee, or agent thereof may assert California Public Records Act Section 6255 or any similar provision as the basis for withholding any documents or information requested under this ordinance.

(h) Neither the City nor any office, employee, or agent thereof may assert an exemption for withholding for any document or information based on a "deliberative process" exemption, either as provided by California Public Records Act Section 6255 or any other provision of law that does not prohibit disclosure.

(i) Neither the City, nor any office, employee, or agent thereof, may assert an exemption for withholding for any document or information based on a finding or showing that the public interest in withholding the information outweighs the public interest in disclosure. All withholdings of documents or information must be based on an express provision of this ordinance providing for withholding of the specific type of information in question or on an express and specific exemption provided by California Public Records Act that is not forbidden by this ordinance.

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.

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SAN FRANCISCO CHARTER**APPENDIX C: - ETHICS PROVISIONS* >>****C3.699-10 - ADMINISTRATION AND IMPLEMENTATION**

The Commission shall have responsibility for the impartial and effective administration and implementation of the provisions of this charter, statutes and ordinances concerning campaign finance, lobbying, conflicts of interest and governmental ethics.

C3.699-11 - DUTIES

The ethics commission shall have the following duties and responsibilities:

1. To administer the provisions of the San Francisco Municipal Elections Campaign Contribution Control Ordinance, and Proposition F, adopted by voters at the June 1986 election, which appears as Appendix K to this charter or any successors to these ordinances.
2. To receive documents required to be filed pursuant to, and to otherwise administer, the provisions of the City's lobbyist registration ordinance.
3. To act as the filing officer and to otherwise receive documents in any instance where the clerk of the board of supervisors, the registrar of voters and, with respect to members of the boards and commissions, department heads would otherwise be authorized to do so pursuant to Chapters 4 and 7 of the California Political Reform Act of 1974 (Government Code sections 81000, et seq.), as amended.
4. To audit campaign statements and other relevant documents and investigate alleged violations of state law, this charter and City ordinances relating to campaign finance, governmental ethics and conflicts of interest and to report the findings to the district attorney, City attorney and other appropriate enforcement authorities. Commission investigation of alleged violations of state law shall be conducted only after the commission has provided to the district attorney and City attorney the information set forth in Section 3.699-12 and the district attorney and City attorney notify the commission that no investigation will be pursued.
5. To provide assistance to agencies, public officials and candidates in administering the provisions of this charter and other laws relating to campaign finance, conflicts of interest and governmental ethics.
6. To make recommendations to the mayor and the board of supervisors concerning (a) campaign finance reform, (b) adoption of and revisions to City ordinances laws related to conflict of interest and lobbying laws and governmental ethics and (c) the submission to the voters of charter amendments relating to campaign finance, conflicts of interest and governmental ethics. The commission shall report to the board of supervisors and mayor annually concerning the effectiveness of such laws. The commission shall transmit its first set of recommendations to the board of supervisors and mayor no later than July 1, 1995.
7. To maintain a whistleblower hot line and administer the provisions of the City's improper government activities ordinance.
8. To annually adjust any limitation and disclosure thresholds imposed by City law to reflect any increases or decreases in the Consumer Price Index. Such adjustments shall be rounded off to the nearest hundred dollars for the limitations on contributions.

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9. To assist departments in developing and maintaining their conflict of interest codes as required by state law.

10. To advocate understanding of the charter and City ordinances related to campaign finance, conflicts of interest, lobbying, governmental ethics and open meetings and public records, and the roles of elected and other public officials, City institutions and the City electoral process.

11. To have full charge and control of its office, to be responsible for its proper administration, subject to the budgetary and fiscal provisions of the charter.

12. To prescribe forms for reports, statements, notices and other documents required by this charter or by ordinances now in effect or hereafter adopted relating to campaign finance, conflicts of interest, lobbying and governmental ethics.

13. To prepare and publish manuals and instructions setting forth methods of bookkeeping, preservation of records to facilitate compliance with and enforcement of the laws relating to campaign finance, conflicts of interest, lobbying and governmental ethics, and explaining applicable duties of persons and committees.

14. To develop an educational program, including but not limited to the following components:
(a) Seminars, when deemed appropriate, to familiarize newly elected and appointed officers and employees, candidates for elective office and their campaign treasurers, and lobbyists with City, state and federal ethics laws and the importance of ethics to the public's confidence in municipal government.

(b) Annual seminars for top-level officials, including elected officers and commissioners, to reinforce the importance of compliance with, and to inform them of any changes in, the law relating to conflicts of interest, lobbying, governmental ethics and open meetings and public records.

(c) A manual which will include summaries, in simple, non-technical language, of ethics laws and reporting requirements applicable to City officers and employees, instructions for completing required forms, questions and answers regarding common problems and situations, and information regarding sources of assistance in resolving questions. The manual shall be updated when necessary to reflect changes in applicable City, state and federal laws governing the ethical conduct of City employees.

(d) A manual which will include summaries, in simple, non-technical language, of City ordinances related to open meetings and public records, questions and answers regarding common problems and situations, and information regarding sources of assistance in resolving questions. The manual shall be updated when necessary to reflect changes in applicable City ordinances related to open meetings and public records.

C3.699-13 - INVESTIGATIONS AND ENFORCEMENT PROCEEDINGS

The commission shall conduct investigations in accordance with this subdivision of alleged violations of this charter and City ordinances relating to campaign finance, lobbying, conflicts of interest and governmental ethics.

(a) Investigations.

If the commission, upon the receipt of a sworn complaint of any person or its own initiative, has reason to believe that a violation of this charter or City ordinances relating to campaign finance, lobbying, conflicts of interest or governmental ethics has occurred, the commission immediately

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shall forward the complaint or information in its possession regarding the alleged violation to the district attorney and City attorney. Within ten working days, after receipt of the complaint or information, the district attorney and City attorney shall inform the commission in writing regarding whether the district attorney or City attorney has initiated or intends to pursue an investigation of the matter

If the commission, upon the sworn complaint or on its own initiative, determines that there is sufficient cause to conduct an investigation, it shall investigate alleged violations of this charter or City ordinances relating to campaign finance, lobbying, conflicts of interest and governmental ethics. A complaint filed with the commission shall be investigated only if it identifies the specific alleged violations which form the basis for the complaint and the commission determines that the complaint contains sufficient facts to warrant an investigation.

Within 14 days after receiving notification that neither the district attorney nor City attorney intends to pursue an investigation, the commission shall notify in writing the person who made the complaint of the action, if any, the commission has taken or plans to take on the complaint, together with the reasons for such action or non-action. If no decision has been made within 14 days, the person who made the complaint shall be notified of the reasons for the delay and shall subsequently receive notification as provided above.

The investigation shall be conducted in a confidential manner. Records of any investigation shall be considered confidential information to the extent permitted by state law. Any member or employee of the commission or other person who, prior to a determination concerning probable cause, discloses information about any preliminary investigation, except as necessary to conduct the investigation, shall be deemed guilty of official misconduct. The unauthorized release of confidential information shall be sufficient grounds for the termination of the employee or removal of the commissioner responsible for such release.

(b) Findings of Probable Cause.

No finding of probable cause to believe that a provision of this charter or City ordinances relating to campaign finance, lobbying, conflicts of interest or governmental ethics has been violated shall be made by the commission unless, at least 21 days prior to the commission's consideration of the alleged violation, the person alleged to have committed the violation is notified of the alleged violation by service of process or registered mail with return receipt requested, is provided with a summary of the evidence, and is informed of his or her right to be present in person and to be represented by counsel at any proceeding of the commission held for the purpose of considering whether probable cause exists for believing the person committed the violation. Notice to the alleged violator shall be deemed made on the date of service, the date the registered mail receipt is signed, or, if the registered mail receipt is not signed, the date returned by the post office. A proceeding held for the purpose of considering probable cause shall be private to the extent permitted by state law unless the alleged violator files with the commission a written request that the proceeding be public.

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CAL. GOV'T CODE §§ 6250 et seq. (Public Records Act)**§ 6254. EXEMPTION OF PARTICULAR RECORDS**

(k) 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.

§ 6255. JUSTIFICATION FOR WITHHOLDING OF RECORDS

(a) The agency shall justify withholding any record by demonstrating that the record in question is exempt under express provisions of this chapter or that on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record.

ARTICLE 2. OTHER EXEMPTIONS FROM DISCLOSURE**III. § 6275. LEGISLATIVE INTENT; EFFECT OF LISTING IN ARTICLE**

It is the intent of the Legislature to assist members of the public and state and local agencies in identifying exemptions to the California Public Records Act. It is the intent of the Legislature that, after January 1, 1999, each addition or amendment to a statute that exempts any information contained in a public record from disclosure pursuant to subdivision (k) of Section 6254 shall be listed and described in this article. The statutes listed in this article may operate to exempt certain records, or portions thereof, from disclosure. The statutes listed and described may not be inclusive of all exemptions. The listing of a statute in this article does not itself create an exemption. Requesters of public records and public agencies are cautioned to review the applicable statute to determine the extent to which the statute, in light of the circumstances surrounding the request, exempts public records from disclosure.

JJJ. § 6276. RECORDS OR INFORMATION NOT REQUIRED TO BE DISCLOSED

Records or information not required to be disclosed pursuant to subdivision (k) of Section 6254 may include, but shall not be limited to, records or information identified in statutes listed in this article.

§ 6276.32. "NARCOTIC ADDICT OUTPATIENT REVOCATION PROCEEDING" TO "OSTEOPATHIC PHYSICIAN AND SURGEON"

• • •
Official information acquired in confidence by public employee, disclosure of, Sections 1040 and 1041, Evidence Code.

CAL. EVIDENCE CODE**SECTION 1040. OFFICIAL INFORMATION**

(a) As used in this section, "official information" means information acquired in confidence by a public employee in the course of his or her duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made.

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(b) A public entity has a privilege to refuse to disclose official information, and to prevent another from disclosing official information, if the privilege is claimed by a person authorized by the public entity to do so and:

(1) Disclosure is forbidden by an act of the Congress of the United States or a statute of this state; or

(2) Disclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice; but no privilege may be claimed under this paragraph if any person authorized to do so has consented that the information be disclosed in the proceeding. In determining whether disclosure of the information is against the public interest, the interest of the public entity as a party in the outcome of the proceeding may not be considered.

Patrick Monette-Shaw

975 Sutter Street, Apt. 6
San Francisco, CA 94109
Phone: (415) 292-6969 • e-mail: pmonette-shaw@earthlink.net

March 6, 2011

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

**Re: Complaint Regarding Failure to Release Correspondence
Between the City Controller and the Ethics Commission**

Dear Mr. Rustom,

Complaint against which Department or Commission:
• City Controller’s Office, Whistleblower Program and City Services Auditor Program
• Ethics Commission

Name of individual(s) responsible at Department or Commission
• Tonia Lediju, City Controller’s Office
• Monique Zmuda, City Controller’s Office
• John St. Croix, Ethics Commission
• Steven Massey, Ethics Commission

Alleged Violation: Public Records Access Public Meeting

Sunshine Ordinance Section(s) §67.24, §67.24(c)(7), §67.24(d), 67.26, and 67.34

Do you want a public hearing before the Sunshine Ordinance Task Force? Yes No

Do you want a pre-hearing conference before the Complaint Committee? Yes No¹

Please describe alleged violation.

1. Summary

This Sunshine complaint involves the denial to provide correspondence between the City Controller’s Whistleblower Program and the Ethics Commission that I had initially sought to obtain from the City Controller’s office. Both the Controller’s Office and the Ethics Commission refused to provide the requested records.

One issue is whether San Francisco Charter’s Appendix F, Section F1.110(b), as implemented by a Board of Supervisor’s Ordinance, can overrule California Public Records Act (CPRA) provisions and San Francisco’s Sunshine Ordinance provisions that **do not exempt** these records from disclosure, which appears to be the position taken by the San Francisco Controller’s Office in denying me access to whistleblower records.

Another issue is that local jurisdictions can’t pass ordinances or Charter amendments that restrict access to — or suddenly make confidential — records which must be disclosed statewide. San Francisco’s charter cannot make exempt what CPRA already allows; otherwise, each city could pass local ordinances preventing access to records the state charter permits. San Francisco isn’t free to design its own approach to records that state has **not** prohibited from disclosure. Local jurisdictions may **increase** access to public records [CPRA §6253(e)], but not limit (**decrease**) greater access to records. The “Home Rule” for Charter Cities cannot apply, because CPRA state law takes precedence.

As the *Allen Grossman vs. San Francisco Ethics Commission* case² illustrates, San Francisco’s Sunshine Ordinance, provides for more **liberal** public access to public records than that provide by CPRA; this enhanced public access is explicitly authorized by CPRA §6253(e).

¹ Jerry Threat’s December 10, 2010 memorandum indicated the Task Force had jurisdiction to hear the *Rita O’Flynn vs. the City Controller* complaint; therefore, the Task Force should have jurisdiction to hear my complaint, so a Complaint Committee pre-hearing should be unnecessary.

² *Allen Grossman vs. San Francisco Ethics Commission*, “Memorandum of Points and Authorities in Support of Verified Petition for Peremptory Writ of Mandate,” October 5, 2009, page 2.

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Despite the fact that “refusal to disclose public records must be based on specific exemptions set forth in the CPRA³,” many of the citations offered to me by the San Francisco City Controller’s Office and the Ethics Commission’s refusals to date to provide the records I requested **do not cite specific exemptions** in CPRA.

As will be demonstrated in this complaint, the exemptions from disclosure that the Ethics Commission and City Controller’s Office provided to me are precluded by the Sunshine Ordinance, and in any event do not apply⁴.

The whistleblower program administered by the City Controller’s office appears to be a vast “black hole,” where legitimate whistleblower complaints appear to vanish under the pretext of total confidentiality. If all information about whistleblower complaints are kept totally confidential, how can the program be accountable to citizens of San Francisco?⁵ The whistleblower program has refused to make even one whistleblower complaint a public record, leading many observers to suspect an additional layer of too much secrecy in City government. This suggests that the whistleblower program may not be performing a full investigation of, or any investigation at all, on every whistleblower complaint it receives.

In the O’Flynn case, the Controller’s Office Whistleblower Complaints Unit asserted⁶ that the Whistleblower Program is **not** subject to the Sunshine Ordinance regarding requests for documents. This is preposterous; there is nothing in the Sunshine Ordinance that provides an entire City Department, or an entire program administered by the City, is totally exempt from the Sunshine Ordinance.

San Francisco’s Sunshine Ordinance strengthens access to records and augments CPRA. San Francisco’s “Whistleblower Program” can no more assert it is **not** subject to the Sunshine Ordinance than it can claim it is **not** subject to CPRA.

2. Details

Table 1 summarizes the chronology of records requests placed regarding release of the City Controller and Ethics Commission investigative files regarding the Laguna Honda Hospital patient gift fund whistleblower complaint.

Table 1: Synopsis of Records Requests Placed, and Responses from City Officials

Enclosure:	Summary and Discussion
1. January 1, 2011 Records Request from Patrick Monette-Shaw to the City Controller’s Office [See Enclosure Page 1 on page 18 of this complaint]	I requested any and all written correspondence between the City Controller’s Office and the Ethics Commission related to the Whistleblower Complaint filed by Drs. Derek Kerr and Maria Rivero regarding the Laguna Honda Hospital Patient Gift fund during the period February 1, 2010 and December 31, 2010.
2. January 13, 2011 Response from Nicholas Delgado, City Controller’s Office [See Enclosure Page 2]	Nicholas Delgado provided a four-page document (“Whistleblower Program.pdf” contained at Enclosure 3 on Enclosure Pages 3 through 6) that appeared to decline providing the requested correspondence. In addition, Delgado’s e-mail response in Enclosure 2 stated in relevant part: “The documents attached and explanations provided herein fulfill the two disclosure of public records requests as detailed above.” Discussion: The four-page document Delgado provided and his cover e-mail did not appear responsive to my initial records request.

³ *Allen Grossman vs. San Francisco Ethics Commission*, “Memorandum of Points and Authorities in Support of Verified Petition for Peremptory Writ of Mandate,” October 5, 2009, page 5.

⁴ *Allen Grossman vs. San Francisco Ethics Commission*, “Memorandum of Points and Authorities in Support of Verified Petition for Peremptory Writ of Mandate,” October 5, 2009, page 9.

⁵ *Allen Grossman vs. San Francisco Ethics Commission*, “Memorandum of Points and Authorities in Support of Verified Petition for Peremptory Writ of Mandate,” October 5, 2009, page 9.

⁶ E-mail to Rita O’Flynn from Randolph Minnis, a supervising auditor in the Whistleblower Complaints Unit, dated September 17, 2010.

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Enclosure:	Summary and Discussion
3. Undated letter provided by Nicholas Delgado on January 13 [See Enclosure Pages 3 through 6]	Please see full discussion of the four-page letter in Section 3, <i>Discussion of Controller's Four-page Undated Letter</i> , below.
4. January 14, 2011 Follow-Up Request from Patrick Monette-Shaw to the City Controller's Office [See Enclosure Page 7]	Since the standard, undated, unsigned, boilerplate document titled "Whistleblower Program" provided by Delgado was unclear, I asked the Controller's Office whether Mr. Delgado was saying that there was no written correspondence of any kind between the Whistleblower Program and Ethics that dealt specifically with the gift fund whistleblower complaint.
5. January 21, 2011 Response from the City Controller's Office [See Enclosure Page 8]	<p>Tonia Lediju's response indicated that a "core mandate" of all whistleblower programs is protection of whistleblower's identities. She stretched the definition of those whose identities should be protected to include anyone who had participated in interviews or discussions related to the fact-finding of the complaint, and further asserted that "all participants" in the "resolution process" are afforded the same protections as provided to the actual whistleblower.</p> <p>Discussion: First, Ms. Lediju provided no legal citation and no exemption to justify the withholding of records. Second, there's the problem of extending whistleblower confidentiality provisions to respondents (in this case, Laguna Honda Hospital senior administrators) to protect respondent identities. <i>The identities of Civil Service employees whose work-related decisions are subject to public inquiry should not be afforded the secrecy</i> Ms. Lediju invoked. She could have employed redaction to the requested records, but chose to withhold the entire records sought, instead.</p>
6. February 6, 2011 Records Request from Patrick Monette-Shaw to the Ethics Commission [See Enclosure Page 9]	<p>Since the City Controller had refused to disclose the requested records, I then sought to obtain the correspondence from the Ethics Commission, again requesting "any and all written communication(s) between the Ethics Commission and the City Controller's Office."</p> <p>While I also requested the Ethics Commission investigative file(s) regarding the patient gift fund complaint, and any closing memo(s) authored by the Ethics Commission staff regarding this LHH patient gift fund complaint, the withholding of the investigative files and closing memos are not part of this Sunshine Complaint; they are the subject of a separate Sunshine Complaint.]</p>
7. February 8, 2011 Response from the Ethics Commission [See Enclosure Page 10]	<p>Ethics Commission staffer Steven Massey declined to provide the requested records — correspondence — citing in his response that under "San Francisco Charter, Appendix C3.699-13(a), all Ethics Commission investigations "shall be conducted in a confidential manner. Records of any investigation shall be considered confidential information to the extent permitted by state law."</p> <p>Discussion: Mr. Massey appears to have deliberately, creatively, and wrongly invoked a citation that does not apply. Charter Appendix §C3.699-13(a) applies only to "campaign finance, lobbying, conflicts of interest and governmental ethics," not to whistleblower complaints. The term "whistleblower" doesn't appear at all in Charter §C3.699-13(a).</p> <p>In addition, Massey claimed that "all Ethics Commission investigations will be conducted in a confidential manner to the extent provided by State law," but Charter §C3.699-13(a) is not a State law, and this Charter section only applies to campaign finance, lobbying, conflicts of interest and governmental ethics cases.</p>

Enclosure:	Summary and Discussion
	<p>As noted in the <i>Allen Grossman vs. San Francisco Ethics Commission</i> case, §C3.699-13 “applies only to the Ethics Laws,” not to the public records Access Laws⁷ [emphasis added].</p> <p>§C3.699-13 states “The Charter states plainly that the Commission shall investigate alleged violations of the Ethics Laws. ... Nowhere in the Charter is this investigative mandate extended to violations of the Access Laws.⁸”</p> <p>“Narrow construction of Section C3.699-13 compels the conclusion that [§C3.699-13] applies only to the Ethics Laws that it names, and not to the Access Laws about which it is silent⁹.”</p> <p>“Section C3.699-13, which mandates investigations and provides that investigation records be kept confidential, applies only to the Ethics Laws¹⁰.” Therefore, Massey’s claim that all Ethics investigations are confidential is incorrect, since §C3.699-13 — which mandates investigations and provides that investigation records be kept confidential — only applies to Ethics Laws.</p> <p>Charter Appendix §C3.699-13(a) was last amended in November 2001, two years after the Sunshine Ordinance was last amended by Proposition G in November 1999. Charter Appendix §C3.699-13 — which applies only to Ethics Laws — can’t overturn provisions in CPRA and San Francisco’s Sunshine Ordinance provisions that were in effect prior to the November 2001 amendment to §C3.699-13, since §C3.699-13 seeks to narrowly construe the public’s right to access contravening California Constitution’s Article 1, Section (b)(2), which requires that the people’s right of access shall be broadly construed. §C3.699-13 appears to seek superseding Sunshine Ordinance §67.26, <i>Withholding Kept to a Minimum</i>, and appears to be superseding Article 1, §(b)(2) of California’s constitution.</p>
<p>8. February 7, 2011 Records Request from Doctors Maria Rivero and Derek Kerr to the City Controller’s Office</p> <p>[See Enclosure pages 11 and 12]</p>	<p>Among other issues Doctors Kerr and River raise in Enclosure 8:</p> <ul style="list-style-type: none"> • The Ethics Commission investigator, Mr. Chatfield, did not mention to Drs. Rivero and Kerr in early 2010 shortly after they filed their whistleblower complaint, any written request by the Ethics Commission asking the Controller’s Whistleblower Program to delay an investigation in order to prevent impeding the Ethics Commission’s own investigation. • The two doctors specifically declined anonymity (and provided their full contact information, including their names, mailing addresses, e-mail addresses, and phone numbers), and have spoken quite publicly ever since May 20, 2010 after experiencing retaliation for having been

⁷ *Allen Grossman vs. San Francisco Ethics Commission*, “Memorandum of Points and Authorities in Support of Verified Petition for Peremptory Writ of Mandate,” October 5, 2009, page 4.

⁸ *Allen Grossman vs. San Francisco Ethics Commission*, “Memorandum of Points and Authorities in Support of Verified Petition for Peremptory Writ of Mandate,” October 5, 2009, page 3.

⁹ *Allen Grossman vs. San Francisco Ethics Commission*, “Memorandum of Points and Authorities in Support of Verified Petition for Peremptory Writ of Mandate,” October 5, 2009, page 4.

¹⁰ *Allen Grossman vs. San Francisco Ethics Commission*, “Memorandum of Points and Authorities in Support of Verified Petition for Peremptory Writ of Mandate,” October 5, 2009, page 4.

Enclosure:	Summary and Discussion
	<p>whistleblowers and after ABC TV's "I-Team" broadcast an investigation on air about the use of LHH's patient gift fund for staff amenities. The two have noted they are willing to sign releases permitting disclosure of the requested documents, and have been quite public about their whistleblower complaint for over eight months.</p> <ul style="list-style-type: none"> The Controller's office considers the audit of Laguna Honda Hospital's patient gift fund to be completed, and all work related to it to be completed. Therefore, if this is actually a closed investigation, there is no need to withhold the requested documents, since the Controller's Office investigation is no longer ongoing. <p>Discussion: Since the two doctors specifically declined anonymity by providing full contact information, and since the Controller's Office has asserted it considers this is a closed investigation, there should be no reason for withholding of the relevant records.</p>
<p>9. February 16, 2011 Response from the City Controller's Office [See Enclosure Page 13]</p>	<p>The second half of Monique Zmuda's February 16 response used the exact same language as Ms. Lediju's response on January 21 noted in Item #5, above.</p> <p>Zmuda's February 16 response repeated that a "core mandate" of all whistleblower programs is protection of whistleblower's identities. She, too, stretched the definition of those whose identities should be protected to include anyone who had participated in interviews or discussions related to the fact-finding of the complaint, and further asserted that "all participants" in the "resolution process" are afforded the same protections as provided to the actual whistleblower.</p> <p>Going a bit further than Lediju had, Zmuda claimed "all materials obtained or received by the Controller's Office regarding a whistleblower complaint or investigation is [sic] confidential," but she provided no legal citation and no exemption to justify and exemption to withhold records.</p> <p>She went even further, claiming "We cannot disclose whether or not there were any communications from or to the Ethics Commission related to the Laguna Honda Hospital gift fund complaint."</p> <p>Discussion: There are no provisions that all information obtained or received by the Controller's Office is to be held confidential, and Lediju and Zmuda have offered no citation to justify withholding of records.</p>

The few citations provided in Table 1 above appear to be attempts to overrule provisions in CPRA, San Francisco's Sunshine Ordinance provisions, and provisions of Article 1, §(b)(2) of California's Constitution, because CPRA and the Sunshine Ordinance **do not exempt** the requested whistleblower **correspondence** records from disclosure.

3. Discussion of Controller's Four-page Undated Letter

Central to the rationale offered by the City denying access to the requested **correspondence** records, is the City Attorney's claim San Francisco's Charter takes precedence over the Sunshine Ordinance, but the City Attorney's claim ignores that the law is that **CPRA appears to takes precedence** over San Francisco's Charter. Given CPRA is the controlling law, San Francisco's Charter is unable to overrule state law.

The four-page, undated, unsigned letter Nicholas Delgado provided me on January 13, 2011 on behalf of the Controller's City Services Auditor function contains a number of unsubstantiated claims for records withholding, as shown in Table 2, beginning on the next page.

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The four-page letter ignores San Francisco's Charter can't make "confidential" what CPRA **does not** make confidential.

Table 2, below, highlights how the citations offered by the City to withhold records do not provide a basis to justify withholding records under CPRA.

Table 2: Citations in Four-page Undated Letter from the City Controller's Office (Keyed to Page and Paragraph #)

Pg #	pP #	Citation Asserted by Controller	Claim Raised by Controller	Discussion
1	1	<ul style="list-style-type: none"> • Campaign & Governmental Conduct Code §4.105 • Campaign & Governmental Conduct Code §4.120(a) 	<ul style="list-style-type: none"> • Any individual who files a complaint may elect to have his or her identity kept confidential 	<ul style="list-style-type: none"> • §4.105 provides that the Ethics Commission shall investigate complaints that allege violations of local campaign finance lobbying, conflicts of interest and governmental ethics laws; it makes no mention of investigating whistleblower cases. <ul style="list-style-type: none"> - This complaint does not involve campaign finance or conflict of interest law. • §4.120(a) states "Any individual who files a complaint under Section 4.105 of this Chapter may elect to have his or her identity kept confidential," but such request for anonymity must be made at the time the complaint is filed. <ul style="list-style-type: none"> - Confidentiality is afforded only to individuals who file complaints, not to others. - Doctors Kerr and Rivero made no such request for anonymity or confidentiality at the time they filed their whistleblower complaint. - §4.120(a) is silent on whether confidentiality can be extended to other individuals who had not filed a complaint.
1	2	<ul style="list-style-type: none"> • S.F. Charter §F1.00 • S.F. Charter §F107(a) • S.F. Charter §F107(b) 	<ul style="list-style-type: none"> • Controller must refer violations involving ethics laws to the Ethics Commission and City Attorney. 	<ul style="list-style-type: none"> • The citations offered by the City Controller in this paragraph do not cite specific exemptions in CPRA. • These citations only address that the City Controller is required to administer a whistleblower complaint program, and must refer complaints involving criminal law to the D.A. and violations of ethics laws to the Ethics Commission. • These citations do not provide a basis for withholding records or an exemption to CPRA.
1	3	<ul style="list-style-type: none"> • S.F. Charter §F107(c) 	<ul style="list-style-type: none"> • "Board of Supervisors to enact and maintain an ordinance protecting the confidentiality of whistleblowers and protecting City officers and employees from 	<ul style="list-style-type: none"> • This citation offered by the City Controller only protects the confidentiality of a whistleblower, not to others. • This citation also requires the

Pg #	pP #	Citation Asserted by Controller	Claim Raised by Controller	Discussion
			<p>retaliation for filing a complaint with, or providing information to the Controller, Ethics Commission, District Attorney, City Attorney, or a City department or commission about improper governmental activity.”</p> <ul style="list-style-type: none"> • Un-specified advice from City Attorney that Controller has a duty to maintain confidentiality even in absence of the Ordinance. 	<p>Board of Supervisors to enact legislation protecting City employees from retaliation after filing a whistleblower complaint.</p> <ul style="list-style-type: none"> • The citation does not provide a basis for withholding records or an exemption to CPRA.
1	4	<ul style="list-style-type: none"> • S.F. Charter §F1.110 	<ul style="list-style-type: none"> • Controller asserts “All drafts, notes, preliminary reports of Controller’s benchmark studies, audits, investigations and other reports shall be confidential.” 	<ul style="list-style-type: none"> • §F1.110(a) provides Controller with subpoena authority to gain access to all records necessary to complete audits and reviews. • §F1.110(b) indicates “except to the extent required by state or federal law,” drafts, notes, preliminary reports of Controller’s benchmark studies, audits, investigations and other reports shall be confidential. State law — CPRA — requires disclosure of the requested records, so §F1.110(b) cannot exempt records CPRA requires be made public. • The citation does not provide an exemption to CPRA.
1	5	<ul style="list-style-type: none"> • Charter section F1.111 	<ul style="list-style-type: none"> • “... establishes the Citizens’ General Obligation Bond Oversight Committee as a Citizens Audit Review Board. Among its duties is to review citizen and employee complaints received through the whistleblower hotline and the Controller’s disposition of those complaints, “subject to appropriate rules ensuring the confidentiality of complainants, as well as the confidentiality of complaints referred to and handled by the District Attorney, the City Attorney and the Ethics Commission ...” 	<ul style="list-style-type: none"> • This citation seeks to protect the confidentiality of the complainants, but again, Drs. Rivero and Kerr had waived anonymity, so confidentiality of the complainant isn’t an issue. • CGOBC’s new subcommittee that acts as an Audit Review Board — a standing committee for audit reviews named the Audit Sub-Committee, which is charged in part with hearing disposition of whistleblower complaints — met for the first time (seven years after the passage of Proposition C in 2003) in January 2011 and a second time on February 3, 2011. The agendas of both meetings of the Audit Sub-Committee heard presentations from the City Services Auditor (Ms. Lediju) regarding the LHH patient gift fund whistleblower complaint filed by Drs. Rivero and Kerr. • Kerr and Rivero attended the February 3 Audit Sub-Committee hearing and presented public testimony, so confidentiality of their whistleblower complaint is

Pg #	pP #	Citation Asserted by Controller	Claim Raised by Controller	Discussion
				<p>not at issue.</p> <ul style="list-style-type: none"> The citation does not provide an exemption to CPRA.
1	6	[No citation offered]	<ul style="list-style-type: none"> The Controller asserted “we now turn to your request. As of July 1, 2004, the Office of the Controller has received 485 complaints under the Whistleblower Program.” 	<ul style="list-style-type: none"> This paragraph offered no citations to justify withholding of records, and instead, summarized the types of complaints received under the Whistleblower Program. It is unclear why this four-page letter provided statistics “as of July 1, 2004,” since my request for records was submitted in December 2010. Since this letter is undated, it is not clear whether it presented an opinion potentially written in July 2004. Absent a citation, there is no exemption to CPRA provided.
2	1, 2	[No citation offered]	<ul style="list-style-type: none"> “Controller’s Office informs complainants that their identities will remain confidential unless they indicate that they do not want confidentiality.” “... <u>Our experience with whistleblower complaints</u> and investigations has made clear that the public disclosure of the complaints will in most instances constitute disclosure of the identity of the complainant, even if the name of the complainant is removed.” ... “Making public the facts in effect exposes to disclosure the identity of the complainant, particularly to those whom the complaint alleges have engaged in the wasteful or improper conduct.” 	<ul style="list-style-type: none"> Ever since first filing their whistleblower complaint, Drs. Kerr and Rivero “cc’d” LHH staff on the complaints, so it is moot that disclosure of a confidential identity would be <u>shared with those against whom allegations</u> had been raised. The Controller’s assertion of having “<u>experience with</u> whistleblower complaints,” — not statutory law — is not a citation justifying a CPRA exemption to withhold records. The Controller offered no citation. Absent a citation, no exemption to CPRA is provided.
2	3	<ul style="list-style-type: none"> Charter §F1.107 Charter §F1.110 Campaign and Government Conduct Code §4.100-4.135 Government Code §6254(k) and 6254(c) 	<ul style="list-style-type: none"> “For the reasons stated below, we decline to <u>disclose the complaints</u> pursuant to” [these citations]. 	<ul style="list-style-type: none"> I hadn’t initially asked that the City Controller disclose Kerr’s and Rivero’s whistleblower complaint; I had initially asked on January 1, 2011 <u>only for</u> correspondence between the City Controller’s Office and the Ethics Commission regarding the Kerr/Rivero whistleblower complaint. / I already had the actual complaint filed by Drs. Rivero and Kerr, who had made their actual complaint public as early as May 20, 2010. The citations do not provide an exemption to CPRA.
2	4	<ul style="list-style-type: none"> Charter §F1.110(b) Campaign and Government Conduct Code §4.120 	<ul style="list-style-type: none"> [Charter §F1.110(b) “makes confidential all drafts, notes, audits, reports and investigations 	<ul style="list-style-type: none"> In the discussion above regarding Enclosure #8, on December 21, 2010 the City Controller’s Office

Pg #	pP #	Citation Asserted by Controller	Claim Raised by Controller	Discussion
			<p>of the Controller. Complaints that are currently under investigation are confidential under this provision and will not be disclosed.”</p>	<p>notified Drs. Rivero and Kerr that the Controller considered its audit of LHH’s patient gift fund “all work related to it” to be complete, indicating that before I made my records request on January 1, the Controller’s review was no longer under investigation, and hence, a closed investigation.</p> <ul style="list-style-type: none"> • If this were actually a “closed investigation,” it could no longer be considered confidential. • As discussed in the item on page 1 on paragraph1 (on page 6 of this complaint above), §4.120(a) states “Any individual who files a complaint under Section 4.105 of this Chapter may elect to have [their] identity kept confidential.” <ul style="list-style-type: none"> – As noted, Kerr and Rivero made no such confidentiality election. • Typically, <i>active investigative exemptions are limited in scope</i>, and typically <i>are only available to law enforcement agencies with penal powers</i>, which the City Controller is not. • Also typically, active criminal investigative and intelligence information exemptions do not prohibit the disclosure of the information, when warranted. <ul style="list-style-type: none"> – Even during the Ed Jew investigation, the San Francisco City Attorney had to release files on their open investigation, of Ed Jew, which they did. • The citations do not provide an exemption to CPRA.
2	5	[No citation offered]	<ul style="list-style-type: none"> • The following grounds for disclosure apply to all complaints, whether currently under investigation or whether the investigation is closed. 	<ul style="list-style-type: none"> • The “following grounds” the City Controller then provided (below) apply to both open and closed investigations. • Lacking any specific citation, no exemption to CPRA is specified.
2	6	<ul style="list-style-type: none"> • Government Code Section 6254(k) 	<ul style="list-style-type: none"> • The Public Records Act allows an agency to decline to disclose “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.” 	<ul style="list-style-type: none"> • The Controller’s Office and Ethics Commission’s refusals to provide me the requested records do not cite a state or federal law that explicitly forbids disclosure. • The citations do not distinguish between whether they are claiming the <i>deliberative process privilege</i> or the <i>official information privilege</i>. • “Refusal to disclose public records must be based on specific

Pg #	pP #	Citation Asserted by Controller	Claim Raised by Controller	Discussion
		<ul style="list-style-type: none"> Evidence Code section 1040 	<ul style="list-style-type: none"> Section 1040 “establishes the official information privilege. Official information means “information acquired in confidence by a public employee in the course of his or her duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made.” ... “A public entity has a privilege to refuse to disclose official information if the privilege is claimed by a person authorized by the public entity to do so and disclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice.” 	<p>exemptions set forth in the CPRA¹¹.</p> <ul style="list-style-type: none"> As the <i>Allen Grossman vs. San Francisco Ethics Commission</i> lawsuit against the Ethics Commission demonstrated, a public agency may claim privilege to refuse to disclose information if disclosure is forbidden by a federal or state statute.” The Controller’s Office and the Ethics Commission offered no citations that demonstrate disclosure is forbidden by state or federal statute, or by an Act of Congress. The official information privilege faces two prongs: <ul style="list-style-type: none"> If disclosure is forbidden by federal or state statute, or If disclosure is against the public interest because confidentiality outweighs the need for public disclosure. In this case, the City Controller’s Office and the Ethics Commission have not offered explicit reasons why the public’s interest in non-disclosure of investigation of Laguna Honda Hospital’s patient gift fund clearly outweighs the public’s interest in full disclosure. As demonstrated in the <i>Allen Grossman vs. San Francisco Ethics Commission</i> lawsuit, the Ethics Commission — and by extension, the City Controller’s Office — bears the burden of demonstrating the public interest in nondisclosure clearly outweighs substantial public interest in full disclosure. Neither agency has done so.
2	7	<ul style="list-style-type: none"> Charter §F.100 	<ul style="list-style-type: none"> Both citations authorize the Controller’s Office, as City Services Auditor, to accept and investigate whistleblower 	<ul style="list-style-type: none"> The “official information privilege” under Section 1040 applies to information acquired in confidence by a public employee,

¹¹ *Allen Grossman vs. San Francisco Ethics Commission*, “Memorandum of Points and Authorities in Support of Verified Petition for Peremptory Writ of Mandate,” October 5, 2009, page 5.

¹² *Allen Grossman vs. San Francisco Ethics Commission*, “Memorandum of Points and Authorities in Support of Verified Petition for Peremptory Writ of Mandate,” October 5, 2009, page 8.

¹³ *Allen Grossman vs. San Francisco Ethics Commission*, “Memorandum of Points and Authorities in Support of Verified Petition for Peremptory Writ of Mandate,” October 5, 2009, page 7.

Pg #	pP #	Citation Asserted by Controller	Claim Raised by Controller	Discussion
		<ul style="list-style-type: none"> • Campaign and Governmental Conduct Code §4.105 and §4.120 	<p>complaints.</p> <ul style="list-style-type: none"> • “The Charter and Section 4.120 compel the Controller to protect the confidentiality of the identity of the complainant [sic]. Therefore, the Controller is authorized to invoke the official information privilege.” 	<p>and not open, or officially disclosed to the public prior to the time the claim of privilege is made.”</p> <ul style="list-style-type: none"> - No privilege can be claimed under this provision if any person authorized to do so has consented that the information be disclosed. Before the City Controller invoked this claim, Drs. Kerr and Rivero had already consented to non-confidentiality. • Notably, the citations to San Francisco Charter §F.100 and Campaign and Governmental §4.120 do not provide the Controller with authority to invoke the official information privilege. The official information privilege is authorized by California Evidence Code §1040, and CPRA §6254(k), not San Francisco’s Charter or the Campaign and Governmental code. • §4.105 provides that the Ethics Commission shall investigate complaints that allege violations of local campaign finance lobbying, conflicts of interest and governmental ethics laws; it makes no mention of investigating whistleblower cases. <ul style="list-style-type: none"> - This complaint does not involve campaign finance or conflict of interest law. • The citations do not provide an exemption to CPRA.
3	1	<ul style="list-style-type: none"> • Appendix F of the Charter • The City’s Whistleblower Program in Campaign and Governmental Conduct Code sections 4.100 – 4.135 	<ul style="list-style-type: none"> • “The complaints are official information. The Controller’s Office acquired them in confidence; they have not been disclosed to the public.” • Controller claims both Appendix F of the Charter and the City’s Whistleblower Program in Campaign and Governmental Conduct Code sections 4.100 – 4.135 offer confidentiality to complainants, complaints and investigations interest [sic] because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice.” 	<ul style="list-style-type: none"> • The City controller’s Office may not claim “official information” since the complaints have been disclosed to the public and were covered extensively not only on KGO-TV, but also in my reporting on Examiner.com. • Neither the City Controller’s Office nor the Ethics Commission have demonstrated a clear necessity that non-disclosure outweighs full disclosure regarding the LHH patient gift fund whistleblower complaint. • The citations do not provide an exemption to CPRA.

Pg #	pP #	Citation Asserted by Controller	Claim Raised by Controller	Discussion
3	2	<ul style="list-style-type: none"> • Campaign and Governmental Conduct Code §4.100 	<ul style="list-style-type: none"> • “Disclosure of the complaints is against the public’s interest.” • “There is a strong public interest in encouraging employees or members of the public to come forward with complaints of improper governmental conduct.” 	<ul style="list-style-type: none"> • There are strong reasons to believe disclosure of this whistleblower complaint is <u>in</u>, not <u>against</u>, the public’s interest. • The citation does not provide a specific exemption to CPRA.
3	3	<ul style="list-style-type: none"> • Charter §F1.107(c) 	<ul style="list-style-type: none"> • “Voters declared the need to protect the identity of complainants and to protect complainants from retaliation. • “If the Controller cannot protect the identity of complainants, whistleblowers will not come forward.” 	<ul style="list-style-type: none"> • As discussed above, §F1.107(c) protects the confidentiality of a whistleblower, not others. • The Controller’s assertion other whistleblowers may not come forward does not provide a specific exemption to CPRA.
3	4	[No citation offered]	<ul style="list-style-type: none"> • “Even when disclosure of a complaint may <u>not</u>... result in the <u>disclosure of the identity</u> of the complainant, <u>disclosure of the complaint would undermine</u> the Whistleblower Program. 	<ul style="list-style-type: none"> • No evidence is presented to support a claim disclosure of any complaint in and of itself in cases having the <u>consent</u> of the whistleblower’s themselves to disclose the complaint — or in cases with or without the identity of complainants being known — would undermine effectiveness of the Whistleblower Program • Here — without any citation to law — the City Controller’s four-page letter attempts to argue that even when disclosure of a complaint <u>does NOT reveal the complainant’s identity</u>, disclosure would nonetheless undermine the Whistleblower Program itself. This portends an <u>enormous “black hole,”</u> where all whistleblower complaints could go, depriving the public of <u>any knowledge</u> at all of what types of whistleblower complaints are being filed. • Lacking a specific citation, no exemption to CPRA is specified.
3	5	<ul style="list-style-type: none"> • Government Code §6254(k) 	<ul style="list-style-type: none"> • The records in question are protected from disclosure because disclosure would in many instances reveal the identity of complainants and undermine the purposes of the Whistleblower Program. 	<ul style="list-style-type: none"> • The “official information <u>privilege</u>” of §6254(k) applies to disclosure of information exempted or <u>prohibited</u> by state or federal law, or by an act of the Congress of the United States. • The citation does not provide a specific exemption to CPRA or citation to federal or state law that <u>prohibits</u> disclosure; “<u>privilege</u>” does not apply to this case. • Drs. Kerr and Rivero submitted their whistleblower complaint to a number of agencies concurrently using courtesy copies (cc’s) and

Pg #	pP #	Citation Asserted by Controller	Claim Raised by Controller	Discussion
				<p>alerted other agencies, so it was not “acquired in confidence” by any agency, and Kerr and Rivero had not requested anonymity. In addition, their whistleblower complaint was disclosed to the public prior to the time that the Controller asserted a claim of privilege in January 2011.</p>
3	6	<ul style="list-style-type: none"> • Government Code §6254(c) • California Constitution, Article 1, §1 	<ul style="list-style-type: none"> • Under the Public Records Act, an agency is not required to disclose ‘personnel, medical, or other similar files,’ the disclosure of which would constitute an unwarranted invasion of personal privacy. An agency may decline to disclose records when the right to privacy outweighs the benefit to the public of receiving the information contained in the records. • An agency may decline to disclose records when the right to privacy outweighs the benefit to the public of receiving the information contained in the records. 	<ul style="list-style-type: none"> • The Whistleblower Complaint filed by Drs. Rivero and Kerr did not involve personnel, medical or similar files that would pose an unwarranted invasion of anyone’s personal privacy. • Drs. Kerr and Rivero have waived their right to privacy and filed their complaint without requesting anonymity; the benefit to the public to receive the Kerr and Rivero whistleblower complaint was not violated. • Kerr and Rivero have consented to the release of their whistleblower complaint, so “privilege” may not be claimed by the City Controller’s Office. • The citation does not provide a specific exemption to CPRA.
4	1	<ul style="list-style-type: none"> • Government Code §6254(c) 	<ul style="list-style-type: none"> • “Here” [apparently referring to my request for correspondence records between the City Controller’s Office and the Ethics Commission], the complaints expressly or implicitly reveal the identities of the complainants. • In addition, they [complaints] frequently name other City employees whom the whistleblower may be accusing. • As noted, the Charter expressly requires the City to protect the identity of the whistleblowers. • In addition those accused of misconduct are entitled to privacy protections unless and until complaints of a substantial nature are proven well-founded. 	<ul style="list-style-type: none"> • The narrative claims raised by the Controller in page 4, paragraph 1 are not covered by Government Code §6254(c). • Since Drs. Kerr and Rivero waived anonymity, the Charter issue is not relevant. • Since the City Services Auditor audit of LHH’s patient gift fund released on November 22, 2010 ordered the substantial restitution of approximately \$350,000 to the patient gift fund, those accused of misconduct are not entitled to privacy since the audit report presented well-founded conclusions that the allegations raised by Kerr and Rivero were correct.
4	2, 3	<ul style="list-style-type: none"> • Charter §F1.111 • Charter §F1.105 • Charter §F1.103 	<ul style="list-style-type: none"> • There is a substantial public interest in ensuring the Whistleblower Program is operating effectively. 	

Pg #	pP #	Citation Asserted by Controller	Claim Raised by Controller	Discussion
			<ul style="list-style-type: none"> • §F1.111 provides for a Citizens Audit Review Board to review complaints received through the Whistleblower Program and the Controller's disposition of these complaints. • The City Services Auditor (CSA) is required to perform, and publish, comprehensive financial and performance audits of City departments. • The City Services Auditor is also required to conduct and publish an annual review of management and employment practices, and conduct best practices reviews and audits. • The Controller will publish periodic reports regarding the number and nature of complaints and the disposition of the complaints. The reports will provide the public with sufficient access to the Program to determine whether the program is operating effectively, without jeopardizing the privacy interest, the confidentiality of complainants, or the efficacy of the Program. 	<ul style="list-style-type: none"> • The Audit Review Board subcommittee has only been in existence for a couple of months; it held its first subcommittee hearing in January 2010 without an agenda mailed to me despite my request to receive <u>all</u> agendas of the CGOBOC and its various subcommittees. Its second meeting was held on February 3, 2011. It is not yet known whether this subcommittee will ensure the Whistleblower Program is operating effectively. • On January 11, 2011, the CSA (Ms. Lediju) presented a written "Quarterly Meeting Update" to CGOBOC. Her Quarterly Update included only four-and-a-half lines summarizing the CSA audit of LHH's gift fund. Her 4.5 lines did not do justice to the CSA's 36-page audit report of the gift fund issued on November 22, 2010, and the Quarterly Update provided no assurance to the public that the Whistleblower Program is operating effectively. <ul style="list-style-type: none"> – The quarterly report Lediju presented is wholly inadequate to educate the public on this whistleblower complaint (or any other complaint) and provided <u>insufficient</u> information for the public to determine if the Whistleblower Program is operating effectively. • The <i>Whistleblower Program Annual Report for FY 09-10</i>¹⁴ — a skimpy seven-page report — indicates that the Whistleblower Program investigated only 45.1% of the 386 complaints it received. Of the remaining 55 percent of the complaints received, 13.7% of the complaints received were outside of the Whistleblower Program's jurisdiction, and only 12.2% were referred to another City department having jurisdiction of the complaints.

¹⁴ "Whistleblower Program Annual Report: July 1, 2009 to June 30, 2010", dated September 7, 2010; downloaded from <http://sfcontroller.org/Modules/ShowDocument.aspx?documentid=1129> on February 21, 2011; page 3.

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Pg #	pP #	Citation Asserted by Controller	Claim Raised by Controller	Discussion
				<ul style="list-style-type: none">• The <i>Whistleblower Program Annual Report for FY 09-10</i> presented summaries of only 9 of the 386 complaints received in FY 09-10. The nine summaries represent just 2.3% of the 386 complaints; in other words, the public did not receive summaries, and the Whistleblower Program did not report on, fully 97.7% of the whistleblower complaints received.• The <i>Whistleblower Program Annual Report for FY 09-10</i> did not even mention the LHH patient gift fund whistleblower complaint submitted by Drs. Kerr and Rivero, nor did it mention the Controller's disposition of the Kerr/Rivero complaint.• The <i>Whistleblower Program Annual Reports</i> do not provide the public "with sufficient access to the Program to determine whether the program is operating effectively," or the efficacy of the Whistleblower Program.• None of these citations provide a specific exemption to CPRA to justify withholding records.

It is clear from Table 2, above, that **none of the citations provided** by the Controller's Office seeking to justify withholding of correspondence records between the City Controller's Office and the Ethics Commission **are valid** exemptions to CPRA. Rather, the citations provided attempt to overrule provisions in CPRA, San Francisco's Sunshine Ordinance provisions, and provisions of Article 1, §(b)(2) of California's Constitution, because CPRA and the Sunshine Ordinance **do not exempt** the requested whistleblower records from disclosure.

It is also clear that the Whistleblower Program is not performing a full investigation of each complaint it receives.

4. The City Controller's Office Claimed It Did Not Investigate This Whistleblower Complaint

One of the issues involved in this complaint, is whether the Whistleblower Program administered by Ms. Lediju in the Controller's Office conducted an investigation of Drs. Kerr's and Rivero's whistleblower complaint.

Another issue is what correspondence, if any, was exchanged between the Controller's Office, the Whistleblower Program, and the Ethics Commission.

On September 28, 2010, during a meeting of the Health Commission's subcommittee, the Laguna Honda Hospital Joint Conference Committee (a.k.a., the LHH-JCC), Ms. Lediju stated:

"On March 2, 2010, complaints about the Laguna Honda Gift Fund were received by the Whistleblower Program. It was also noted by the Ethics Commission.

Part of our process is to make sure we don't duplicate efforts. Some of our investigations, depending on the types of investigations they are, we will send them out to certain departments. The Ethics Commission is one of those departments. The Ethics Commission stated they would investigate the complaint, and as a result **we closed off**

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the complaint and we continued to collaborate with the Ethics Commission to ensure that the investigation was ongoing and things were moving along as they should [emphasis added].

On June 2, we received an e-mail from Ethics confirming they were still addressing the complaint, and also indicated the DA's Office was reviewing the allegation."

During a subsequent meeting of the LHH-JCC on December 3, 2010, Ms. Lediju then stated:

"Our Whistleblower Team **did not do** an investigation on those complaints [Drs. Kerr's and Rivero's complaint], because it was sent to the Ethics Commission, and they were already in the process" [emphasis added].

It is not clear whether the whistleblower complaint filed by Drs. Kerr and Rivero was included in the "Not Enough Information" category (13.5%) or the "No Action" category (12.4%) of the 55% of whistleblower complaints that the Whistleblower Program did **not** investigate in FY 09-10¹⁵.

If the City Controller's office did not do a whistleblower investigation of Drs. Kerr's and Rivero's complaint, it should not be permitted to claim withholding of records for an investigation it did **not** conduct.

In addition, Section F1.107(a)(4) of the Legal Text of Proposition C, a charter amendment placed before voters in November 2003, states:

"... The Controller shall investigate and otherwise attempt to resolve such individual [whistleblower] complaints **except for those** which ... the [Ethics] Commission **states in writing** that investigation by the Controller would substantially impede or delay [the Ethics Commission's] own investigation of the matter."

To date, neither the Controller's Office nor the Ethics Commission have provided any written records stating that the Ethics Commission had or has expressly invoked provision of §F1.107(a)(4) asking the Controller's Office in writing **not to conduct** an investigation of the Kerr and Rivero whistleblower complaint on the basis that it would impede the Ethics Commission's own investigation. Absent such a written request from the Ethics Commission **specific to** the Kerr and Rivero whistleblower complaint, the Controller's Office had no basis authorizing its Whistleblower Program **not** to conduct an investigation of their own.

There is nothing in §F1.107(a)(4) that permits the Ethics Commission and the Controller's Office to enter into a global "blanket rule" waiving investigative requirements of the Controller's Office for all whistleblower complaints; indeed, §F1.107(a)(4) appears to require a written request on a case-by-case basis for each individual whistleblower complaint the Ethics Commission seeks to have the Controller's Office suspend investigating.

5. Provisions in San Francisco's Sunshine Ordinance Take Precedence

Sunshine Ordinance §67.24(b)(2) states that when litigation "is settled, records of all communications between the department and the adverse party shall be subject to disclosure." Similarly, if an investigation by the Whistleblower's Program or the Ethics Commission is closed ("settled"), records of all communications between departments should be subject to disclosure.

More specifically, Sunshine Ordinance §67.24(c)(7) states that "The record of any confirmed misconduct of a public employee involving personal dishonesty, **misappropriation of public funds**, etc." is **not exempt from disclosure** under Government Code §6254(c).

Sunshine Ordinance §67.24(d) states that "Records pertaining to any **investigation**, arrest or other law enforcement activity shall be disclosed to the public once the District Attorney or court determines that a prosecution will **not** be sought against the subject involved." Although Sunshine Ordinance §67.24(d)(2) states that records can be segregated and withheld — based on the particular facts of whether "the public interest in nondisclosure clearly and substantially outweighs the public

¹⁵ "Whistleblower Program Annual Report: July 1, 2009 to June 30, 2010", dated September 7, 2010; downloaded from <http://sfcontroller.org/Modules/ShowDocument.aspx?documentid=1129> on February 21, 2011; page 3.

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interest in disclosure” — if release of personal information would constitute an unwarranted invasion of privacy, **§67.24(d) concludes that it does NOT exempt from disclosure any portion of any records of a concluded inspection.**

Finally, Sunshine Ordinance §67.26 states that “No records shall be withheld from disclosure **in its entirety unless all information contained in it is exempt** from disclosure under express provisions of CPRA. Information that is exempt from disclosure shall be redacted, per §67.26, but the entire file may not be withheld.”

6. Additional Discussion

There is substantial public interest in the full disclosure of the requested records. The need for confidentiality **does not** outweigh the need for full disclosure in this case.

The exemption citations invoked by the City Controller’s Office and the Ethics Commission to provide correspondence are invalid, for the reasons presented above. As such, the Sunshine Task Force should order release of the requested correspondence records.

Unlike the Rita O’Flynn complaint, the City Services Auditor and Whistleblower program did **not** invoke Government Code §8547.7 as grounds to withhold disclosure of the correspondence records I requested. In any event, Government Code §8547.7 applies to the State Auditor; there is nothing in the controlling local law (San Francisco’s Sunshine Ordinance) for the local San Francisco Controller’s whistleblower program requiring adherence to Government Code §8547.7.

7. Remedies Sought

Should the Sunshine Ordinance Task Force find that this complaint has merit, I specifically request that the Task Force’s Order of Determination be worded to order that:

- The City Controller’s Whistleblower Program and the Ethics Commission immediately release any and all correspondence (including all e-mails and any written correspondence) between the City Controller’s Whistleblower program administered by Ms. Lediju and the Ethics Commission regarding the Laguna Honda Hospital patient gift fund whistleblower complaint.

Sincerely,

[Signed]

Patrick Monette-Shaw

Enclosures (as stated)

Enclosure 1: Monette-Shaw January 1, 2011 Records Request to City Controller

Subject: IMMEDIATE DISCLOSURE REQUEST FOR PUBLIC RECORDS: Written Correspondence Between City Controller and the Ethics Commission
From: pmonette-shaw@earthlink.net
Reply-To: Pmonette-shaw@earthlink.net
Date: 1/1/2011 4:45 PM
To: Monique.Zmuda@sfgov.org, Tonia.Lediju@sfgov.org, Elisa.Sullivan@sfgov.org,

IMMEDIATE DISCLOSURE REQUEST FOR PUBLIC RECORDS: Written Correspondence Between City Controller and the Ethics Commission

January 1, 2011

Monique Zmuda
Deputy City Controller
City Controller's Office
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102

Tonia Lediju
Director of Audits
City Services Audit Program, City Controller's Office
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102

Elisa Sullivan
Audit Manager
City Services Audit Program, City Controller's Office
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102

Dear Ms. Zmuda, Ms. Lediju and Ms. Sullivan,

This is an Immediate Disclosure Request for public records under San Francisco's Sunshine Ordinance, the California Public Records Act, Proposition 59, and the Brown Act.

Please provide any and all written correspondence between the City Controller's Office and the Ethics Commission related to the Whistleblower Complaint filed by Drs. Derek Kerr and Maria Rivero regarding the Laguna Honda Hospital Patient Gift fund during the period February 1, 2010 and December 31, 2010.

Written correspondence, as used in this records request, is defined as any and all letters, memo's, memorandum's, and e-mails exchanged between any and all members of the Controller's Office staff and any and all members of the Ethics Commission's staff during the period February 1, 2010 and December 31, 2010 regarding Kerr's and Rivero's gift fund whistleblower complaint.

Thank you.

Patrick Monette-Shaw

Enclosure 2: Nicholas Delgado's January 13 Reponse to Enclosure 1

Subject: Re: IMMEDIATE DISCLOSURE REQUEST FOR PUBLIC RECORDS
From: Nicholas.Delgado@sfgov.org
Date: 1/13/2011 5:27 PM
To: Pmonette-shaw@earthlink.net
Cc: Tonia.Lediju@sfgov.org, Elisa.Sullivan@sfgov.org, Debbie.Toy@sfgov.org

Mr Monette-Shaw:

On December 23, 2010, you submitted a request for disclosure of public records regarding the Laguna Honda Hospital Gift Fund Audit, stating the following:

"Please provide a breakout of those 50+ deposits to staff sub-accounts, indicating for each deposit, the date of deposit, source of the deposit, amount deposited to each of the four staff education sub-accounts, and purpose for each deposit, if known.

Second, for the \$176,481 transferred from the patient-related gift fund sub-account into a LHH capital project fund in FY 2006-07, please provide documentation from the Controller's office and or the CSA audit describing the details of this transaction and the name of capital project fund the money was initially transferred into. Please provide, at minimum, both the initial FAMIS transaction for \$176,481 in FY 06-07 and the subsequent FAMIS transaction restoring this money back into the patient gift fund. If the Controller's Office has any additional documents describing this transaction, in addition to the FAMIS printouts, please provide the additional documentation, as well."

In response please see the following attached documents:

The first document, entitled "Contribution Revenue," is the documentation maintained by CSA in relation to the 50 transactions tested in conjunction with the review of Laguna Honda Gift Fund revenue in staff-related accounts. This file will provide you with the detail for each transaction reviewed, indicating the date, source and amount of each transaction. Additionally, this file provides the detail of CSA's findings related to each transaction.

The remaining documents are those in relation to the \$176,481 as identified on page 7 of CSA's audit report for the Laguna Honda Gift Fund. The files entitled "FY2007 Fund Transfer JE," and "Correcting Entries for \$176k," represent the original entry as extracted from the City's FAMIS, and the correcting entries as recorded by the Controller's Office. The last document represents CSA's audit work paper providing the background of the entry and related information to support the finding as represented in the audit report.

Separately, on January 1, 2011, a second disclosure request was submitted which stated the following:

"Please provide any and all written correspondence between the City Controller's Office and the Ethics Commission related to the Whistleblower Complaint filed by Drs. Derek Kerr and Maria Rivero regarding the Laguna Honda Hospital Patient Gift fund during the period February 1, 2010 and December 31, 2010."

In response to this request, please see the attached document immediately following:

The documents attached and explanations provided herein fulfill the two disclosure of public records requests as detailed above.

Respectfully,

Nicholas Delgado
Auditor
Office of the Controller
City Services Auditor Division
City and County of San Francisco
Tel: 415-554-7575

E-mail attachments

-
- | | |
|-------------------------------------|---|
| • Contribution Revenue.pdf | • Audit Work Paper - FY2007 Fund Transfer JE - \$176k.pdf |
| • FY2007 Fund Transfer JE.PDF | • Whistleblower Program.pdf |
| • Correcting Entries for \$176K.pdf | |



CITY AND COUNTY OF SAN FRANCISCO
OFFICE OF THE CONTROLLER

Ben Rosenfield
Controller
Monique Zmuda
Deputy Controller

The City's Whistleblower Programs

The City has established two Whistleblower Programs. First, the Board of Supervisors has created a Whistleblower Program. Under this Program, complaints about improper governmental activity may be made to the Ethics Commission, Controller, District Attorney, City Attorney, or the complainant's department. (Campaign & Governmental Conduct Code §4.105.) Any individual who files a complaint may elect to have his or her identity kept confidential. (Camp. & Gov't Conduct Code §4.120(a).)

In addition to the Program just described, in November 2003, San Francisco voters amended the San Francisco Charter to establish the Controller as the City Services Auditor and, among other duties, to require the Controller to administer a City Whistleblower Complaints Program. (S.F. Charter §F1.00.) Under this Program, the Controller is authorized to receive, investigate and attempt to resolve complaints concerning "the quality and delivery of government services, wasteful and inefficient City government practices, misuse of government funds, and improper activities by City government officers and employees." (S.F. Charter §F.107(a).) The Controller must refer complaints alleging conduct that may constitute a violation of criminal law to the District Attorney or other appropriate law enforcement agency and complaints alleging violations of governmental ethics laws to the Ethics Commission and City Attorney. (Charter §F.107(b).)

Charter section F1.107(c) requires the Board of Supervisors to enact and maintain an ordinance protecting the confidentiality of whistleblowers and protecting City officers and employees from retaliation for filing a complaint with, or providing information to the Controller, Ethics Commission, District Attorney, City Attorney, or a City department or commission about improper governmental activity. The City Attorney has advised that this office has a duty to maintain the confidentiality of the identity of whistleblowers even in the absence of such an ordinance.

Section F1.110 expressly provides that all drafts, notes, preliminary reports of Controller's benchmark studies, audits, investigations and other reports shall be confidential.

Charter section F1.111 establishes the Citizens' General Obligation Bond Oversight Committee as a Citizens Audit Review Board. Among its duties is to review citizen and employee complaints received through the whistleblower hotline and the Controller's disposition of those complaints, "subject to appropriate rules ensuring the confidentiality of complainants, as well as the confidentiality of complaints referred to and handled by the District Attorney, the City Attorney and the Ethics Commission . . ." (Charter §F1.111.)

Whistleblower Complaints and the Complaint Process

We now turn to your request. As of July 1, 2004, the Office of the Controller has received 485 complaints under the Controller's Whistleblower Program. About a third of the complaints the Program has received allege waste, fraud, or abuse of City funds or

Enclosure 3 Continued: Whistleblower Program.pdf

Page 2

resources. The remaining complaints cover a wide range of issues, including requests for information, employee grievance issues not under the Controller's jurisdiction, and City contract irregularities. In addition, some of the complaints relate to matters handled by the Ethics Commission and City Attorney, in which case this office has referred the complaints to those officials as required by the Charter.

The Controller's Office informs complainants that their identities will remain confidential unless they indicate that they do not want confidentiality. The overwhelming majority of complainants insist on confidentiality. Many will decline to provide any information until they are assured of that confidentiality.

Moreover, our experience with whistleblower complaints and investigations has made clear that the public disclosure of the complaints will in most instances constitute disclosure of the identity of the complainant, even if the name of the complainant is removed. The detailed descriptions provided by complainants of alleged waste or wrongdoing frequently could be known only by a few people. Therefore, making public the facts in effect exposes to disclosure the identity of the complainant, particularly to those whom the complaint alleges have engaged in the wasteful or improper conduct.

For the reasons stated below, we decline to disclose the complaints pursuant to Charter section F1.107, F1.110, Campaign and Governmental Conduct Code sections 4.100-4.135, and Government Code sections 6254(k) and 6254(c) of the California Public Records Act.

Charter Section F1.110(b)

Charter section F1.110(b) makes confidential all drafts, notes, audits, reports and investigations of the Controller. Complaints that are currently under investigation are confidential under this provision and will not be disclosed. See, also, Camp. & Gov't Conduct Code §4.120.

The following grounds for disclosure apply to all complaints, whether currently under investigation or whether the investigation is closed.

Government Code section 6254(k)

The Public Records Act allows an agency to decline to disclose "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." (Government Code Section 6254(k).) Evidence Code section 1040 establishes the official information privilege. Official information means "information acquired in confidence by a public employee in the course of his or her duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made." (Evid. Code §1040.) A public entity has a privilege to refuse to disclose official information if the privilege is claimed by a person authorized by the public entity to do so and disclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice. (*Ibid.*)

The Charter authorizes the Controller's Office, as City Services Auditor, to accept and investigate complaints. (Charter § F.100.) The Controller is also authorized to receive complaints under the whistleblower program set forth in Section 4.105 of the Campaign and Governmental Conduct Code. The Charter and Section 4.120 of the Campaign and Governmental Conduct Code compel the Controller to protect the confidentiality of the

Enclosures Page 4

identity of the complainant. Therefore, the Controller is authorized to invoke the official information privilege.

The complaints are official information. The Controller's Office acquired them in confidence; they have not been disclosed to the public. As noted above, both Appendix F of the Charter and the City's Whistleblower Program in Campaign and Governmental Conduct Code sections 4.100 - 4.135 offer confidentiality to complainants, complaints and investigations interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice. (*Ibid.*)

Finally, disclosure of the complaints is against the public's interest. As noted above, there is a strong public interest in encouraging employees or members of the public to come forward with complaints of improper governmental conduct. (See Campaign and Governmental Conduct Code §4.100 ["The City and County of San Francisco has a paramount interest in protecting the integrity of its governmental institutions. To further this interest, individuals should be encouraged to report to the City's Ethics Commission, Controller, District Attorney, City Attorney and the complainant's department possible violations of laws, regulations and rules governing the conduct of City officers and employees."])

The voters have also declared the need to protect the identity of complainants and to protect complainants from retaliation. (Charter §F1.107(c).) If the Controller cannot protect the identity of complainants, whistleblowers will not come forward. As noted above, public disclosure of the complaints will in most instances effectively disclose the identity of the complainant, even if the name of the complainant is removed. Therefore, non-disclosure of the complaints is necessary in most instances to protect the identity of the complainants.

Even where disclosure of a complaint may not, under the circumstances of a specific case, result in the disclosure of the identity of the complainant, disclosure of the complaint would undermine the Whistleblower Program. If potential complainants were to learn that this office disclosed complaints, they would operate under the misguided impression that their complaint might be disclosed despite assurances to the contrary. Potential complainants would be unlikely to understand that disclosure was based on fine distinctions made after reviewing the details and individual circumstances of each complaint. As a result, they would refrain from making whistleblower reports, fearing that theirs might also be disclosed.

For these reasons, the records in question are protected from disclosure under Government Code section 6254(k) because disclosure would in many instances reveal the identity of complainants and, even as to complaints that would not disclose this information, undermine the purposes of the Whistleblower Program.

Government Code section 6254(c)

Under the Public Records Act, an agency is not required to disclose "personnel, medical, or other similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy." (Govt. Code sec. 6254(c).) This section codifies in the Public Records Act the right to privacy provided in the California Constitution. (See Cal. Const. Art. 1, § 1.) An agency may decline to disclose records when the right to privacy outweighs the benefit to the public of receiving the information contained in the records. (*Braun v. City of Taft* (1984) 154 Cal.App.3d 332, 345-347.)

Here, the complaints expressly or implicitly reveal the identities of the complainants. In addition, they frequently name other City employees whom the whistleblower may be accusing. As noted above, the Charter expressly requires the City to protect the identity of the whistleblowers. In addition, those accused of misconduct are entitled to privacy protections unless and until complaints of a substantial nature are proven well-founded. (*American Federation of State, County and Municipal Employees v. Regents of the University of California* (1978) 80 Cal.App.3d 913, 917-919.) Thus, we decline to disclose the complaints under Government Code section 6254(c).

Public Interest in the Whistleblower Program

While we decline to disclose the complaints, we recognize and agree that there is a substantial public interest in ensuring that the Whistleblower Program is operating effectively. There are a number of mechanisms built into the Program that will ensure that we meet the public's interest. First, Charter section F1.111 provides for a Citizens Audit Review Board to review the citizen and employee complaints received through the Whistleblower Program and the Controller's disposition of those complaints. Second, the Controller/City Services Auditor is required to perform, and publish, comprehensive financial and performance audits of City departments. (Charter section F1.105.) Third, the Controller/City Services Auditor is also required to conduct and publish an annual review of management and employment practices and conduct best practices reviews and studies. (Charter sec. F1.103.)

As part of these new duties, the Controller will publish periodic reports regarding the number and nature of complaints and the disposition of the complaints. The reports will be posted on the City's website at www.sfgov.gov/whistleblower, when available. These reports will provide the public with sufficient access to the Program to determine whether the Program is operating effectively, without jeopardizing the privacy interests, the confidentiality of complainants, or the efficacy of the Program.

For the foregoing reasons, this office declines to disclose the complaint information that you have requested.

Enclosure 4: Monette-Shaw January 14, 2011 Follow-Up Request to City Controller

Subject: Is Mr. Delgado Saying No Correspondence With Ethics?: Re: IMMEDIATE DISCLOSURE REQUEST FOR PUBLIC RECORDS
From: pmonette-shaw@earthlink.net
Reply-To: Pmonette-shaw@earthlink.net
Date: 1/14/2011 7:17 AM
To: Tonia.Lediju@sfgov.org, Monique.Zmuda@sfgov.org,
Cc: Nicholas.Delgado@sfgov.org, Elisa.Sullivan@sfgov.org, Debbie.Tov@sfgov.org

Dear Ms. Zmuda and Ms. Lediju:

In response to my records request for written correspondence between the Whistleblower Program and the Ethics Department regarding the gift fund whistleblower complaint, Mr. Delgado provided a standard, undated, unsigned, boilerplate document titled "Whistleblower Program."

Is he saying that there were no written correspondence of any kind between the Whistleblower Program and Ethics that dealt specifically with the gift fund whistleblower complaint?

Thanks.

Patrick

Enclosure 5: Tonia Lediju's January 21, 2011 Response to Monette-Shaw Follow-Up Request

Subject: Re: IMMEDIATE DISCLOSURE REQUEST FOR PUBLIC RECORDS
From: Tonia.Lediju@sfgov.org
Date: 1/21/2011 2:27 PM
To: Pmonette-shaw@earthlink.net
Cc: Debbie.Toy@sfgov.org, Elisa.Sullivan@sfgov.org, Monique.Zmuda@sfgov.org, Nicholas.Delgado@sfgov.org,

Dear Mr. Monette-Shaw,

The Whistleblower Program does acknowledge that there are communications which occur routinely with the Ethics Department. However, we can not disclose whether or not there were any communications related to the Laguna Honda Hospital gift fund complaint. The core mandate of all whistleblower programs is protection of whistleblower identities. This includes any information that might disclose or lead to the identification of the original whistleblower as well as anyone that has participated in interviews/discussions related to the fact finding surrounding the complaint. All participants in the complaint resolution process are afforded the protections outlined as a "whistleblower."

Respectfully,

TLediju

Tonia Lediju
Audit Director
Office of the Controller, City Services Auditor
City & County of San Francisco
TEL: (415) 554-5393
FAX: (415) 554-7664
<http://www.sfgov.org/controller/csa>

Enclosure 6: Monette-Shaw February 6, 2011 Records Request to Ethics Commission

Subject: IMMEDIATE DISCLOSURE REQUEST FOR PUBLIC RECORDS: Ethics Investigation of LHH Patient Gift Fund Complaint
From: pmonette-shaw@earthlink.net
Reply-To: Pmonette-shaw@earthlink.net
Date: 2/6/2011 3:54 PM
To: john.stcroix@sfgov.org, richard.mo@sfgov.org, garrett.chatsfield@sfgov.org

IMMEDIATE DISCLOSURE REQUEST FOR PUBLIC RECORDS: Ethics Investigation of LHH Patient Gift Fund Complaint

February 6, 2011

John St. Croix
Executive Director
Ethics Commission
25 Van Ness Avenue, Suite 220
San Francisco, CA 94102

Garrett Chatsfield
Investigator
Ethics Commission
25 Van Ness Avenue, Suite 220
San Francisco, CA 94102

Richard Mo
Investigator
Ethics Commission
25 Van Ness Avenue, Suite 220
San Francisco, CA 94102

Dear Mr. St. Croix, Mr. Chatsfield, and Mr. Mo,

This is an Immediate Disclosure Request for public records under San Francisco's Sunshine Ordinance, the California Public Records Act, Proposition 59, and the Brown Act.

On March 2, 2010, former LHH doctors Derek Kerr and Maria Rivero filed a complaint with the Ethics Commission regarding the LHH patient gift fund.

Please provide:

1. Any and all written communication(s) between the Ethics Commission and the City Controller's Office (including the City Controller, the City Services Auditor, and/or the Controller's Whistleblower Program) regarding this complaint.
2. The Ethics Commission investigative file(s) regarding the patient gift fund complaint.
3. Any closing memo(s) authored by the Ethics Commission staff regarding this LHH patient gift fund complaint.

Thank you.

Patrick Monette-Shaw

Enclosure 7: Steven Massey Response to Monette-Shaw Ethics Commission Request

Subject: Re: [Fwd: IMMEDIATE DISCLOSURE REQUEST FOR PUBLIC RECORDS: Ethics Investigation of LHH Patient Gift Fund Complaint]
From: Ethics.Commission@sfgov.org
Sender: Steven.Massey@SFGOV.ORG
Date: 2/8/2011 3:16 PM
To: Pmonette-shaw@earthlink.net

Dear Mr. Monette-Shaw:

This is a response to your February 6, 2011, Immediate Disclosure Request which we received on Monday, February 7, 2011.

Under San Francisco Charter, Appendix C3.699-13(a), all Ethics Commission investigations "shall be conducted in a confidential manner. Records of any investigation shall be considered confidential information to the extent permitted by state law."

For this reason we are not disclosing the requested records.

Sincerely,

Steven Massey
San Francisco Ethics Commission
415-252-3100

Enclosure 8: Doctors Kerr and Rivero February 7, 2011 Records Request to City Controller

Subject: ETHICS COMMISSION LETTER - DISCLOSURE OF PUBLIC RECORDS REQUEST
From: missforties@hotmail.com
Date: 2/7/2011 8:35 PM
To: tonia.lediju@sfgov.org, monique.zmuda@sfgov.org, ben.rosenfield@sfgov.org
CC: [Derek Kerr](mailto:Derek.Kerr@sfgov.org), maura.lane@sfgov.org, elisa.sullivan@sfgov.org, winnie.woo@sfgov.org,
nicholas.delgado@sfgov.org, garrett.chatfield@sfgov.org, richard.mo@sfgov.org,
missforties@hotmail.com, normsite@yahoo.com, [Patrick Monette-Shaw](mailto:Patrick.Monette-Shaw@sfgov.org), [George Wooding](mailto:George.Wooding@sfgov.org)

Ms. Tonia Lediju, Director, Controller's Whistleblower Program
Ms. Monique Zmuda, Deputy City Controller
Mr. Ben Rosenfield, City Controller
San Francisco Controller's Office
City Hall - Room 316
San Francisco, CA 94102

Dear Ms. Lediju, Ms. Zmuda and Mr. Rosenfield,

This is an **immediate** disclosure request for public records in accord with the San Francisco Sunshine Ordinance, The California Public Records Act, State Proposition 59 that passed in 2004, and the HM Brown Act.

This is a follow-up to a public records request sent to your Office by Mr. Patrick Monette-Shaw on 1/1/11.

Request:

Please provide any and all memos, e-mails, letters and/or correspondence from the San Francisco Ethics Commission to the Controller, Controller's Whistleblower Program, and/or City Services Auditor related to our complaint about the Laguna Honda Hospital (LHH) Patient Gift Fund.

We request documents sent or received between 3/2/10 when we submitted our complaint to your Whistleblower Program Office, and 9/1/10 when action was finally taken to conduct an Audit of the LHH Gift Fund. Specifically, we seek any and all documents wherein the Ethics Commission requested that you delay, refer elsewhere, or forego an investigation of our LHH Gift Fund complaint.

Even if such a document from the Ethics Commission is **not** available, our request would include any memos, e-mails, letters and/or messages from Controller Ben Rosenfield and/or Deputy Controller Monique Zmuda requesting, suggesting and/or directing the Whistleblower Program to delay, refer elsewhere or forego an investigation of our LHH Gift Fund complaint between 3/2/10 and 9/1/2010.

Background:

a) Proposition C on Postponing Whistleblower Investigations

The legal text of Proposition C, that passed on 11/04/2003 explains in section F1.107 titled; "**Citizens' Complaints: Whistleblowers**" that the Controller must refer certain complaints to the Ethics Commission or District Attorney. It also states;

"Nothing in this section shall preclude the Controller from investigating whether any alleged criminal conduct also violates any civil or administrative law, statute, ordinance, or regulation".

Further, the Controller may postpone an investigation when there is

"...an existing, ongoing investigation by the District Attorney, the City Attorney, or the Ethics Commission where either official or the Commission **states in writing** that investigation by the Controller would substantially impede or delay his, her, or its own investigation of the matter".

b) Ms. Lediju on Postponing the LHH Gift Fund Investigation

At the Health Commission's LHH-JCC meeting on 9/28/10 Ms. Lediju indicated that the Whistleblower Program had waited 6 months for "our partners" in the Ethics Commission to complete their review, before starting a

Enclosures Page 11

Enclosure 8 Continued: Doctors Kerr and Rivero February 7, 2011 Records Request

Whistleblower Program investigation of the Gift Fund. However, no mention was made of any written request by the Ethics Commission to the Whistleblower Program to forestall its own investigation.

A transcript of the Health Commission's LHH-JCC meeting on 12/3/10 shows that Ms. Lediju repeated;

"Those allegations came in through a formal whistleblower complaint **that was cc'd to my office** - and sent to the Ethics Commission."

"Our Whistleblower Program **did not** do an investigation on those complaints because it was sent to the Ethics Commission and they were already in the process".

In fact, our Whistleblower complaint was mailed directly to the Whistleblower Program Office on 3/2/10 and received by registered mail on 3/4/10. We specifically requested that the **Whistleblower Program** address our complaint and offered to meet with their investigators. A **copy** of this Whistleblower Program complaint was mailed simultaneously to the Ethics Commission.

When we later contacted Mr. Garrett Chatfield, an Ethics Commission investigator, we asked why the Controller's Whistleblower Program was **not investigating our complaint, and why it had been referred instead to the Ethics Commission**. We emphasized that our complaint was about the handling of money, fiscal irregularities involving City funds rather than Ethics. Mr. Chatfield could **not** provide an explanation, saying he was not privy to decision-making in the Controller's Office. There was no mention of any written request by the Ethics Commission to the Whistleblower Program to postpone their investigation.

c) Confidentiality and Disclosure of Records

We understand, from Ms. Lediju's response to Mr. Patrick Monette-Shaw, that the Whistleblower Program keeps information confidential because "The core mandate of all whistleblower programs is protection of whistleblower identities". There is also the need to protect ongoing investigations and the rights of those reported for alleged wrong-doing¹⁶.

But in this case, we are the whistleblowers. We have declined anonymity. We spoke publicly once we experienced retaliation, and realized we would not be granted an opportunity to speak with Whistleblower Program investigators. We are prepared to sign releases permitting you to disclose the requested document if it reveals our already well-known identities.

Also, since the LHH Gift Fund Audit was released to the public on 11/22/10, your investigation is closed. Deputy Controller Ms. Zmuda told us as much in her e-mail dated 12/21/10;

"...the Controller's Office has completed its audit of the Laguna Honda Gift Fund...We consider this audit **and all work related to it** to be completed".

Therefore, there is no need to withhold the requested document in order to protect any ongoing or future investigation. Lastly, the respondent in our Gift Fund complaint is the LHH Executive Administrator, a high-level Public Service appointee whose work-related decisions are subject to public inquiry. Please redact references to any individuals whose identities you wish to protect, while still providing the requested document.

Procedure:

Please send the requested document(s) electronically, or please tell us where and when we can pick up a paper copy and perhaps meet with you. We will pay copying costs.

Thanking you in advance,

Derek Kerr, MD (cell: 533-4416)

Maria Rivero, MD (cell 925-451-1454)

CC: Citizens General Obligation Bond Oversight Committee (CJOB)
Civil Grand Jury

¹⁶ Drs. Kerr and Rivero were referring in this sentence to a statement made in the undated, four-page document sent to Mr. Monette-Shaw by the Whistleblower Program; the sentence refers to an unproven rationale offered by the City that it must protect the right of those alleged of wrong-doing.

Enclosure 9: Monique Zmuda's February 16, 2011 Response to Kerr/Rivero Records Request

Subject: Re: ETHICS COMMISSION LETTER - DISCLOSURE OF PUBLIC RECORDS REQUEST
To: DerekonVanNess@aol.com; missforties@hotmail.com
CC: Tonia.Lediju@sfgov.org; Debbie.toy@sfgov.org
From: Monique.Zmuda@sfgov.org
Date: Wed, 16 Feb 2011 15:51:49-0800

Dear Drs. Kerr and Rivero,

I am responding to your inquiry for information related to memos, e-mails, letters and/or correspondence from the San Francisco Ethics Commission to the Controller, Controller's Whistleblower Program, and/or City Services Auditor related to our complaint about the Laguna Honda Hospital (LHH) Patient Gift Fund. As you know, all materials obtained or received by the Controller's Office regarding a whistleblower complaint or investigation is confidential. We cannot disclose whether or not there were any communications from or to the Ethics Commission related to the Laguna Honda Hospital gift fund complaint. The core mandate of all whistleblower programs is protection of whistleblower identities. This includes any information that might disclose or lead to the identification of the original whistleblower as well as anyone that has participated in interviews/discussions related to the fact finding surrounding the complaint. All participants in the complaint resolution process are afforded the protections outlined as a "whistleblower."

Respectfully,

Monique Zmuda
Deputy Controller
City and County San Francisco
554-7579
Monique.Zmuda@sfgov.org

Tonia Lediju/CON/SFGOV
03/22/2011 03:58 PM

To SOTF/SOTF/SFGOV@SFGOV
cc Monique Zmuda/CON/SFGOV@SFGOV, Ben
Rosenfield/CON/SFGOV@SFGOV,
whistleblower/CON/SFGOV@SFGOV, Monica
bcc
Subject Sunshine Complaint Received: #11013_Patrick
Monette-Shaw vs Controller's Office, Ethics Commission

The Office of the Controller is contesting jurisdiction based on the fact that Mr. Monette-Shaw's complaint seeks records of Whistleblower investigations that by law are protected from disclosure. Attached is a letter of explanation.

Respectfully Submitted,

Tonia Lediju

Audit Director
Office of the Controller, City Services Auditor
City & County of San Francisco
TEL: (415) 554-5393
FAX: (415) 554-7664
<http://www.sfgov.org/controller/csa>



DOC_20110322160808_000.PDF



CITY AND COUNTY OF SAN FRANCISCO
OFFICE OF THE CONTROLLER

Ben Rosenfield
Controller
Monique Zmuda
Deputy Controller

Sunshine Ordinance Task Force
c/o Chris Rustom, Clerk
1 Dr. Carlton B. Goodlett Place
City Hall, Room 244
San Francisco, CA 94102-4689

Re: Complaint #11013 Patrick Monette-Shaw vs. Controller's Office, Ethics Commission

Dear Members of the Sunshine Ordinance Task Force:

This complaint involves a request for correspondence between the City Controller's Office and the Ethics Commission related to a Whistleblower complaint involving the Laguna Honda Gift Fund.

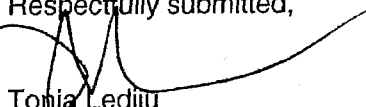
The position of the Controller's Office is that the Sunshine Ordinance Task Force does not have jurisdiction to hear Mr. Monette-Shaw's complaint because it seeks records of Whistleblower investigations that by law are protected from disclosure. This Office has provided written support for this position in another matter that recently came before the Complaint Committee of the Task Force. Complainant Rita O'Flynn also sought Whistleblower records (Complaint #10057). This Office argued in the O'Flynn case that the Task Force did not have jurisdiction to hear a complaint asking for whistleblower records. Notwithstanding the arguments raised by this Office, the Complaint Committee disagreed with our position, determining that the Task Force had jurisdiction to hear the O'Flynn complaint and referring the matter to the full Task Force for hearing.

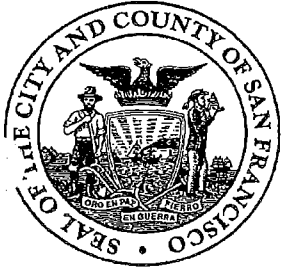
The O'Flynn complaint was filed in October of 2010. Although we continue to disagree with the Complaint Committee's determination on this matter, the Controller's Office will not contest the jurisdiction of the Task Force over the current complaint because the Complaint Committee has essentially addressed the same jurisdictional issue in O'Flynn. It would be a waste of the resources of both of our agencies to ask the Complaint Committee to hear arguments on an issue that it has so recently been heard and decided adversely to the Controller's Office.

However, please be aware that the Controller's Office continues to disagree with the Complaint Committee on this issue as a matter of law, and reserves the right to assert in other forums that the Task Force does not have jurisdiction over this complaint.

The Controller's Office will respond fully in writing to the substance of Mr. Monette-Shaw's Complaint at a later date. We will demonstrate that the complaint is without merit.

Respectfully submitted,


Tonia Lediju
Director of Audits



ETHICS COMMISSION CITY AND COUNTY OF SAN FRANCISCO

BENEDICT Y. HUR
CHAIRPERSON

JAMIENNE S. STUDLEY
VICE-CHAIRPERSON

EILEEN HANSEN
COMMISSIONER

BEVERLY HAYON
COMMISSIONER

CHARLES L. WARD
COMMISSIONER

JOHN ST. CROIX
EXECUTIVE DIRECTOR

March 23, 2011

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

Re: Ethics Commission Response to Sunshine Complaint #11013

Dear Mr. Rustom:

This correspondence is in response to the above-referenced complaint. Patrick Monette-Shaw requested records of written communication between our department and the Controller's Office regarding "a complaint with the Ethics Commission regarding the LHH patient gift fund."

The San Francisco Charter provides that records of any Ethics Commission investigation "*shall* be considered confidential to the extent permitted by state law." S.F. Charter § C3.699-13 (emphasis added). The Charter further states that "the unauthorized release of confidential information shall be sufficient grounds for the termination of the employee or the removal of the commissioner responsible for such release." *Id.*

The Commission's regulations state that prior to a probable cause determination, "no complaint...investigative file or information...or Commissioner and staff deliberations about complaints shall be disclosed except as necessary to the conduct of an investigation." S.F. Ethics Comm. Regs. for Investigations and Enforcement Proceedings § XIII(B)(1).

For these reasons, we are not required to disclose the requested records.

Sincerely,

Richard Mo
Chief Enforcement Officer



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

04/05/2011 07:20 AM

Please respond to
pmonette-shaw@earthlink.net

To sotf@sfgov.org
cc
bcc
Subject Supplementary Material for Complaints #11013 and 11014
Monette-Shaw: Waiver of Confidentiality Request for our
LHH Gift Fund Complaint

April 5, 2011

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

Dear Mr. Rustom,

I am forwarding below a waiver of confidentiality that Drs. Kerr and Rivero submitted to the Ethics Commission and the Controller's Whistleblower Program. Please be sure to include this waiver in the SOTF members' packets for both SOTF Complaint #11013 ****and**** Complaint #11014.

Thank you.

Patrick Monette-Shaw

----- Message from Maria Rivero <missforties@hotmail.com> on Sun, 3 Apr 2011 14:18:09 -0700 -----

To: <tonia.lediju@sfgov.org>, <garrett.chatfield@sfgov.org>, <richard.mo@sfgov.org>
Derek Kerr <derekonvanness@aol.com>, <missforties@hotmail.com>, Patrick Monette
cc: Shaw <pmonette-shaw@earthlink.net>; <monique.zmuda@sfgov.org>,
<ben.rosenfield@sfgov.org>

Su

bje Waiver of Confidentiality Request for our LHH Gift Fund Complaint

ct:

April

3rd, 2011
Tonia Lediju, Director
Controller's Whistleblower Program

Office of the SF Controller
City Hall, Room 316
San Francisco, CA 94102

Garrett Chatfield, Investigator
Richard Mo, Supervisor
SF Ethics Commission
25 Van Ness Avenue
San Francisco, CA 94102

By e-mail and First Class mail

Re: Waiver of Confidentiality Request for our LHH Gift Fund
Whistleblower Complaints

Dear Ms. Lediju, Mr. Chatfield and Mr. Mo,

We are signing this Release of Information and Waiver of Confidentiality to allow you to disclose any and all documents related to our Whistleblower complaints about the Laguna Honda Hospital Patient Gift Fund submitted to you from 3/2/10 to date.

On 2/7/11 we e-mailed each of you a follow-up records request indicating that we had declined anonymity, and were prepared to sign a release permitting you to disclose a requested document - even if it revealed our already well-known identities. Our e-mail came to you one month **before** Patrick Monette-Shaw submitted 2 related complaints (#11013 and #11014) to the Sunshine Ordinance Task Force on 3/6/11.

In this matter, we specifically request and authorize the Whistleblower Program and the Ethics Commission to disclose our identities, as well as any documents that may identify us, to Mr. Patrick Monette-Shaw, members of the Sunshine Ordinance Task Force, and the general public.

Respectfully,

Derek Kerr, MD
(cell: 533-4416)
2701 Van Ness Avenue, #611
San Francisco, Ca 94109
DerekOnVanNess@aol.com

Maria Rivero, MD
(cell: 925-451-1454)
522 Valley Street
San Francisco, CA
missforties@hotmail.com

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

Monique Zmuda, Deputy SF Controller

Ben Rosenfield, SF Controller

Patrick Monette-Shaw

975 Sutter Street, Apt. 6
San Francisco, CA 94109
Phone: (415) 292-6969 • e-mail: pmonette-shaw@earthlink.net

April 10, 2011

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

**Re: #11013: Rebuttal to Ethics and Controller's Responses—
Executive Summary**

Dear Mr. Rustom,

This letter provides supporting documentation to SOTF Complaint #11013, and is a rebuttal to the Ethics Commission's and City Controller's responses dated March 23, 2011 from both Richard Mo and Tonia Lediju.

Rebuttal to City Controller's Response

As I noted in my initial March 6 complaint (#11013), the City Controller's four-page letter providing its rationale for withholding the requested records provides no valid CPRA exemptions. I also noted in my March 6 complaints (#11013 and #11014) that the Ethics Commission and the City Controller provided no valid CPRA exemption.

The Controller's undated four-page letter cited at least four sections of Campaign and Government Conduct Code, approximately nine sections of the San Francisco City Charter, two sections of Government Code 6254, Evidence Code 1040, and Article 1, Section 1 of the California Constitution. None of those 17 citations — as I demonstrated in my initial March 6 complaint — provide justifiable exemptions under CPRA to withhold the requested records.

I draw the Task Force's attention to additional discussion I presented in my initial March 6 complaint (#11013).

Rebuttal to the Ethics Commission Response (Complaint #11014) Also Applies to Complaint #11013 for Both the City Controller's Response (Complaint #11013) and the Ethics Commission's Response (Complaint #11013)

In his March 23 response, Mr. Mo asserted that SF Charter §699-13 stipulates that Ethics Commission investigations shall be considered confidential to the extent permitted by state law. The City Controller relies on the same argument to Complaint #11013.

Mo states that Ethics Commission regulations take precedence — apparently over CPRA. Dealing with the latter issue first, there is no provision in CPRA that local Ethics Commission regulations provide an exemption to CPRA, nor does Mr. Mo and the Ethics Commission provide a specific exemption under state law or in CPRA to justify withholding.

Mo also stated on March 23: "The Charter [§699-13] further states that "the unauthorized release of confidential information shall be sufficient grounds for the termination of the employee or the removal of the commissioner responsible for such release."

Should the SOTF find that Mo's claimed exemption is not applicable — which it is not — then release of the requested records is not "*unauthorized*," release is, in fact, *required*, and Mo's use of the term "unauthorized release" is moot.

More importantly, Mo's characterization that "any Ethics Commission investigation shall be considered confidential to the extent permitted by state law," is misleading. The operative words are "to the extent permitted by state law," but §6254(f) — which creates the exemption for investigatory records, but which Mo ignores — does **not** apply to any official or agency whose investigatory files are not "**compiled by any other state or local agency for correctional, law enforcement, or licensing purposes.**" It is clear this includes the Ethics Commission, which has no correctional, law enforcement, or licensing functions, nor does it apply to the City Controller's Office and its various sub-programs, which also have no correctional, law enforcement, or licensing functions.

April 10, 2011

Re: #11013: **Rebuttal to Ethic's and Controller's Responses – Executive Summary**

Page 2

Further, the courts have limited the §6254(f) exemption to offices and agencies that have police investigative power, which the Ethics Commission and City Controller's Office do not have. The Ethics Commission and the City Controller are just other agencies, as far as CPRA is concerned.

As I noted in my initial March 6 complaints (#11013 and #11014): "As noted in the *Allen Grossman vs. San Francisco Ethics Commission* case, §C3.699-13 "applies only to the Ethics Laws," not to the public records Access Laws¹ [emphasis added].

As I also indicated in my March 6 complaint, the official information privilege faces two prongs:

- If disclosure is forbidden by federal or state statute, or
- If disclosure is against the public interest because confidentiality outweighs the need for public disclosure.

Neither Mo and the Ethics Commission, nor the City Controller, have cited any state or federal statute(s) that forbids disclosure of the requested records.

In addition, §67.24(g) of the Sunshine Ordinance specifically indicates City agencies and employees may NOT assert CPRA Section 6255 or similar provisions as the basis for withholding documents. §67.24(h) of the Sunshine Ordinance prohibits the use of the "deliberative process" exemption of CPRA as an exemption for withholding. §67.24(i) of the Sunshine Ordinance prohibits claiming an exemption for withholding based on whether the public interest in withholding information outweighs the public interest in disclosure.

Invocation of the "Interests of Justice" exemption under the Official Information exemption has been ruled² by the California Supreme Court to be the same as the *Public Interest Balancing* test — which is clearly prohibited by the Sunshine Ordinance. Since Sunshine Ordinance §67.24(i) eliminates that test as an exemption, this means that Evidence Code 1040 is not an available exemption to any San Francisco respondent.

Since CPRA does not exempt Ethics investigations, whatever Mr. Mo and Ms. Lediju claim is in the San Francisco Charter is moot, and should be ruled irrelevant by the Sunshine Task Force.

Sunshine Ordinance §67.36 indicates the Ordinance supersedes other local laws. Therefore, the requirement that results in greater access to public information — in this case, the Ordinance, not the Charter — applies.

Since the City Charter cannot make nondisclosable what is disclosable under State law, the Task Force should reject Mr. Mo's and Ms. Lediju's assertions.

I draw the Task Force's attention to additional discussion I presented in my initial March 6 complaints (#11013 and #11014).

Sincerely,

[Signed]

Patrick Monette-Shaw

¹ *Allen Grossman vs. San Francisco Ethics Commission*, "Memorandum of Points and Authorities in Support of Verified Petition for Peremptory Writ of Mandate," October 5, 2009, page 4.

² *CBS, Inc. v Block*, 42 Cal. 3d 646.656 (1986).



CITY AND COUNTY OF SAN FRANCISCO
OFFICE OF THE CONTROLLER

Ben Rosenfield
Controller
Monique Zmuda
Deputy Controller

Sunshine Ordinance Task Force
c/o Chris Rustom, Clerk
1 Dr. Carlton B. Goodlett Place
City Hall, Room 244
San Francisco, CA 94102-4689

Re: Complaint #11013 Patrick Monette-Shaw vs. Controller's Office, Ethics Commission

Dear Members of the Sunshine Ordinance Task Force:

Complainant Patrick Monette-Shaw seeks records of correspondence, including emails and any written correspondence, between the Controller's Office and the Ethics Commission regarding a complaint filed concerning the Laguna Honda Hospital gift fund.

Factual Background.

There were various complaints filed with the Ethics Commission and the Controller in connection with the Laguna Hospital gift fund and related matters. There also were press reports on allegations made about the gift fund. In 2010, the City Services Auditor of the Office of the Controller conducted an audit of the Laguna Hospital Gift Fund. In November 22, 2010, the Controller's Office issued a report entitled "Department of Public Health – Laguna Honda Hospital Needs to Improve the Management of Its Gift Fund." This audit dealt with complaints about the handling of the gift fund. The Controller's Office understands that the Ethics Commission is handling other issues related to the controversy over the gift fund.

Mr. Monette-Shaw filed a public records act request dated January 1, 2011, with the Controller's Office seeking "written correspondence between the City Controller's Office and the Ethics Commission related to the Whistleblower Complaint filed by ... regarding the Laguna Honda Hospital Patient Gift fund during the period February 1, 2010 and December 31, 2010." The Controller's Office responded with a document that explained the City's Whistleblower Program and its confidentiality provisions, and declined to produce further documents.

Summary of Arguments.

In this complaint to the Task Force, Mr. Monette-Shaw contends that the City Charter provisions do not make any withheld documents confidential because the City's Sunshine Ordinance and state Public Records Act do not permit confidentiality.

Mr. Monette-Shaw is incorrect. Under both state and local law, the Controller's Office properly released its audit report, and also properly kept any further documentation confidential. Because the Controller's investigation and the Ethics Commission

investigation involved overlapping issues, any communication between those departments remains a confidential part of the Controller's investigation.

Mr. Monette-Shaw also argues that records he has requested are not confidential because those who filed the complaints with the Controller and Ethics Commission have consented to the disclosure of their identities. But a whistleblower has no authority to consent to release of any other information from a whistleblower complaint. Disclosure of the records of investigation is governed by local and State law.

Local Laws Making Whistleblower Records Confidential

The local laws making Whistleblower records confidential arise under both the Charter and the San Francisco Municipal Code. Charter Section F1.110(b) (providing that "all drafts, notes, preliminary reports of Controller's benchmark studies, audits, investigations and other reports shall be confidential."); S.F. Campaign and Governmental Conduct Code §4.123 (requiring City officers and employees to keep confidential, among other information, "information related to the investigation, including drafts, notes, preliminary reports, working papers, records of interviews, communications with complainants and witnesses, and any other materials and information gathered or prepared in the course of the investigation.")

State Laws Protecting City Whistleblower Records

The complainant does not dispute the scope or intent of the local laws, described above, in protecting Whistleblower information. Rather, he argues that the Controller is required to release the requested records unless State law permits nondisclosure. The complainant notes that "local jurisdictions can't pass ordinance or Charter amendments that restrict access to – or suddenly make confidential – records which must be disclosed statewide."

In fact, State law does protect the records of Whistleblower investigations. We now discuss those State laws including Government Code Section 53087.6.

California Government Code Section 53087.6

Although not cited in our response to Mr. Monette-Shaw's public records request, California Government Code Section 53087.6 ("Section 53087.6") is additional authority for the withholding of records of Whistleblower investigations.

Section 53087.6 authorizes the city auditor to conduct an investigative audit upon receiving specific information that an employees has engaged in an improper government activity. Gov. Code §53087.6(e)(1). Section 53087.6 requires county auditors to keep Whistleblower investigation audits confidential and allows disclosure only in limited circumstances. The Controller is San Francisco's auditor.

Section 53087.6 (e)(2) and (3) provide as follows (emphasis added):

(e)(2) Any investigative audit conducted pursuant to this subdivision shall be kept confidential, except to issue any report of an investigation that has been substantiated, or to release any findings resulting from a completed investigation that are deemed necessary to serve the interests of the public. In any event, the identity of the individual or individuals reporting the improper government activity, and the subject employee or employees shall be kept confidential.

In this matter, the whistleblowers sent their complaints to the Controller and the Ethics Commission. As stated above, the Controller conducted an investigative audit. Under Section 53087.6(e)(2), the report and findings may be released, but the remainder of the audit remains confidential. Here, the Controller did publicly release a report and findings, entitled "Department of Public Health -- Laguna Honda Hospital Needs to Improve the Management of Its Gift Fund." State law makes any additional documents, such as any correspondence with the Ethics Commission about related complaints, confidential.

Evidence Code Section 1040 (Official Information Privilege)

The official information privilege protects information, not already made public, acquired in confidence by a public employee if disclosure "is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice." Cal. Evid. Code §1040 ("Section 1040").

The complainant argues that Section 1040 does not apply in this case because the whistleblowers in this matter have consented to the disclosure of their identities and information from the investigation. While whistleblowers may consent to have their identity released, they have no authority to consent to release of other information involved in the investigation. If internal communications from an investigation were routinely released, other witnesses may be intimidated from coming forward in the fear that their identities would be revealed, or investigators may be chilled in conducting their investigative work.

The Right to Privacy

The right to privacy is protected under the California Constitution and the Public Records Act. Cal. Const. Art. 1, section 1; California Government Code Section 6254(c).

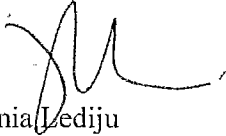
Those accused of misconduct are entitled to privacy unless and until the alleged wrongdoing has been confirmed. The constitutional and statutory right to privacy in California extends to all persons, including City employees. The San Francisco Sunshine recognizes the right of privacy to which City employees are entitled. The Ordinance requires the disclosure of personnel information, including specific provisions governing the disclosure of records of misconduct. As to these records, the Ordinance requires disclosure only if the misconduct has been confirmed. S.F. Admin. Code §67124(c)(7). See, also, Government Code Section 53087.6 discussed below, which makes whistleblower investigative records confidential except to issue reports of substantiated complaints and to release findings resulting from a completed investigation, but prohibits disclosure of the identity of whistleblowers and the subject employee or employees.

The complainant disagrees, pointing to the audit of the Laguna Honda Hospital gift fund done by the Controller in its capacity as City Services Auditor. The complainant argues that "those accused of misconduct are not entitled to privacy since the audit report presented well-founded conclusions that the allegations raised by ... were correct." But a

finding of erroneous accounting practices is different from a finding that an employee has engaged in misconduct which constitutes a crime or for which the employee can be disciplined or terminated. Nothing in the gift fund audit confirms such misconduct.

For these reasons, the Controller's Office asks that Mr. Monette-Shaw's complaint be denied. If you have any additional questions or concerns, please contact me at (415) 554-5393.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'Tonia Lediju', written over a horizontal line.

Tonia Lediju
Director of Audits, City Services Auditor