

Date: April 26, 2011

Item No. 6 & 7

File No. 11014

## SUNSHINE ORDINANCE TASK FORCE

### AGENDA PACKET CONTENTS LIST\*

- Patrick Monette-Shaw v Ethics Commission**
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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.



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## MEMORANDUM

April 20, 2011:

*PATRICK MONETTE-SHAW VS. ETHICS COMMISSION (110014)*<sup>1</sup>

### 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 the following records:

2. The Ethics Commission investigative files(s) regarding the patient gift fund complaint.
3. Any closing memo(s) authored by Ethics Commission staff regarding this LHH patient gift fund complaint.

#### 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, 2011, 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

#### APPLICABLE CASE LAW:

See case law cited in analysis, below.

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<sup>1</sup> Mr. Monette-Shaw has separate but related complaints about the Controller's Office and the Ethics Commission concerning correspondence files related to this same whistleblower complaint, which are addressed in separate memoranda.

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**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 the following records:

2. The Ethics Commission investigative files(s) regarding the patient gift fund complaint.
3. Any closing memo(s) authored by Ethics Commission staff regarding this LHH patient gift fund complaint.

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.

Ethics' 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 investigative files and staff memos related to an investigation by Ethics of a whistleblower complaint?
- 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",<sup>2</sup> the question arises whether the City could by Charter make them confidential and therefore exempt from disclosure under state law.

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<sup>2</sup> 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

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*Public Records Acts Exemptions*

The Public Records Act (PRA) is a state statute. It thus generally preempts local law,<sup>3</sup> 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

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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 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.

<sup>3</sup> 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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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.

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.<sup>4</sup>

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<sup>4</sup> 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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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 confidential and allows withholding, regardless of what the Sunshine Ordinance would otherwise require.<sup>5</sup>

**CONCLUSION**

THE TASK FORCE FINDS THE FOLLOWING FACTS TO BE TRUE:

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

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<sup>5</sup> 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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**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



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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.

**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.

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**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.

**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

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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.

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.

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(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 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

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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.

**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

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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

(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.

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

**Re: Complaint Regarding Failure to Release Investigative Files  
and Closing Memo's Regarding LHH Patient Gift Fund**

Dear Mr. Rustom,

Complaint against which Department or Commission: • Ethics Commission  
Name of individual(s) responsible at Department or Commission • 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  No<sup>1</sup>

**Please describe alleged violation.**

**1. Summary**

This Sunshine complaint involves the denial by the Ethics Commission to provide its investigative file and/or closing memo's of the Ethics Commission investigation of the whistleblower complaint regarding Laguna Honda Hospital's patient gift fund.

The Ethics Commission's refusal to provide the requested records cited only San Francisco Charter Appendix §C3.699-13(a). 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* case<sup>2</sup> 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).

Despite the fact that "refusal to disclose public records must be based on specific exemptions set forth in the CPRA<sup>3</sup>," the citation offered to me by the Ethics Commission refusing to provide the records I requested does not cite a specific exemption in CPRA.

Without disclosure of the investigative files or closing memo(s), it is not known whether the Ethics Commission even conducted an investigation of the whistleblower complaint filed by doctors Maria Rivero and Derek Kerr. If the Ethics

<sup>1</sup> 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.

<sup>2</sup> *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.

<sup>3</sup> *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.

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**Re: Complaint Regarding Failure to Release Investigative Files and Closing Memo's Regarding LHH Patient Gift Fund**  
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Commission did not conduct an investigation, it cannot then claim to withhold investigative files by citing Appendix §C3.699-13(a).

2. **Details**

Table 1 summarizes the records requests I placed with the Ethics Commission regarding its investigative files of the Laguna Honda Hospital patient gift fund whistleblower complaint.

**Table 1: Synopsis of Records Requests Placed, and Responses from the Ethics Commission**

Enclosure:	Summary and Discussion
1 February 6, 2011 Records Request from Patrick Monette-Shaw to the Ethics Commission [See Enclosure Page 1]	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."  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 <u>not</u> part of this Sunshine Complaint'; they are the subject of a separate Sunshine Complaint.]
2. February 8, 2011 Response from the Ethics Commission [See Enclosure Page 2]	Ethics Commission staffer Steven Massey declined to provide the requested records — <u>correspondence</u> — citing in his response that under "San Francisco Charter, Appendix C3.699-13(a), <u>all Ethics Commission investigations</u> "shall be conducted in a confidential manner. Records of any investigation shall be considered confidential information to the extent permitted by state law."  <b>Discussion:</b> 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," <u>not</u> to whistleblower complaints. The term "whistleblower" doesn't appear at all in Charter §C3.699-13(a).  In addition, Massey claimed that " <u>all</u> 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.  As noted in the <i>Allen Grossman vs. San Francisco Ethics Commission</i> case, §C3.699-13 " <u>applies only to the Ethics Laws,</u> " not to the public records Access Laws <sup>4</sup> [emphasis added].  §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." <sup>5</sup>

<sup>4</sup> *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.

<sup>5</sup> *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.



Enclosure:	Summary and Discussion
	<p>“Narrow construction of Section C3.699-13 compels the conclusion that [§C3.699-13] <b>applies only to the Ethics Laws</b> that it names, and not to the Access Laws about which it is silent<sup>6</sup>.”</p> <p>“Section C3.699-13, which mandates investigations and provides that investigation records be kept confidential, <b>applies only to the Ethics Laws</b><sup>7</sup>.” Therefore, Massey’s claim that <b>all Ethics investigations</b> 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 <b>after</b> the Sunshine Ordinance was last amended by Proposition G in November 1999. Charter Appendix §C3.699-13 — which applies only to <b>Ethics</b> 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 <b>narrowly construe</b> 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 <b>be broadly construed</b>. §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>

The citation provided in Table 1 above appears to 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 **investigative** records from disclosure.

**3. Discussion**

Central to the rationale offered by the City denying access to the requested **investigative** records, is the Ethics Commission’s claim San Francisco’s Charter takes precedence over the Sunshine Ordinance, but the Ethics Commission 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.

- Typically, *active investigative exemptions are limited in scope*, and typically *are only available to law enforcement agencies with penal powers*, which the Ethics Commission is not.
- Also typically, active criminal investigative and intelligence information exemptions do not **prohibit** the disclosure of the information, when warranted.
  - 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 Ethics Commission’s refusal to provide me the requested records **does not cite a state or federal law that explicitly** forbids disclosure.
- The citation provided did not distinguish between whether the Ethics Commission was claiming the *deliberative process privilege* or the *official information privilege*.

<sup>6</sup> *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.

<sup>7</sup> *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.

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- “Refusal to disclose public records must be based on specific exemptions set forth in the CPRA<sup>8</sup>.
- As the *Allen Grossman vs. San<sup>9</sup> Francisco Ethics Commission* 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 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:
  - 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 Ethics Commission has not offered an explicit reason 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 *Allen Grossman vs. San<sup>10</sup> Francisco Ethics Commission* lawsuit, the Ethics Commission bears the burden of demonstrating the public interest in nondisclosure clearly outweighs substantial public interest in full disclosure. The Ethics Commission has not done so.

- The Ethics Commission did not demonstrate a clear necessity that non-disclosure outweighs full disclosure regarding the LHH patient gift fund whistleblower complaint.

**The citation provided** by the Ethics Commission to justify withholding of its investigative file **is not a valid** exemption to CPRA.

#### 4. It Is Unknown whether the City Controller’s Office or the Ethics Commission Even Investigated the Laguna Honda Hospital patient gift fund Whistleblower Complaint

As I demonstrated in my previous Sunshine Complaint the Controller’s Office claimed its Whistleblower Program had **not** conducted an investigation of Drs. Kerr’s and Rivero’s whistleblower complaint. The Whistleblower Program’s director, Tonia Lediju, did state on September 28, 2010 that the Whistleblower Program had “continued to collaborate with the Ethics Commission to ensure that the investigation was ongoing, and things were moving along as they should.”

The Ethics Commission may now be backpedaling saying that it did **not** conduct an investigation, contradicting Ms. Lediju’s statement on September 28 that her program was collaborating with Ethics.

If the Ethics Commission 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.

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, the Ethics Commission has not provided any written correspondence 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**

<sup>8</sup> *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.

<sup>9</sup> *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.

<sup>10</sup> *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.

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investigation of the Kerr and Rivero whistleblower complaint on the basis that it would impede the Ethics Commission's own investigation.

There is nothing in §F1.107(a)(4) that permits the Ethics Commission to enter into a global "blanket rule" with other agencies 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 of LHH's patient gift fund whistleblower complaint by the Ethics Commission is closed ("settled") — or was never conducted — 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 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 citation invoked by the Ethics Commission refusing to provide its investigative file or closing memo(s) is invalid, for the reasons presented above. As such, the Sunshine Task Force should order release of the requested investigative records.

Unlike the Rita O'Flynn complaint, the Ethics Commission did not invoke Government Code §8547.7 as grounds to withhold disclosure of the investigative 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) 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:

- a. The Ethics Commission release its investigative file(s) regarding Drs. Kerr's and Rivero's patient gift fund whistleblower complaint.
- b. The Ethics Commission must release its closing memo(s) regarding the LHH patient gift fund whistleblower complaint.

March 6, 2011

**Re: Complaint Regarding Failure to Release Investigative Files and Closing Memo's Regarding LHH Patient Gift Fund**  
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Sincerely,

[Signed]

Patrick Monette-Shaw

Enclosures (as stated)

**Enclosure 1: Monette-Shaw February 6, 2011 Records Request to Ethics Commission**  
[Same as Enclosure 6 in Previous Sunshine Complaint]

Subject: IMMEDIATE DISCLOSURE REQUEST FOR PUBLIC RECORDS: Ethics Investigation of LHH Patient Gift Fund Complaint  
From: [pmonette-shaw@earthlink.net](mailto:pmonette-shaw@earthlink.net)  
Reply-To: [Pmonette-shaw@earthlink.net](mailto:Pmonette-shaw@earthlink.net)  
Date: 2/6/2011 3:54 PM  
To: [john.stcroix@sfgov.org](mailto:john.stcroix@sfgov.org), [richard.mo@sfgov.org](mailto:richard.mo@sfgov.org), [garrett.chatsfield@sfgov.org](mailto: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 2: Steven Massey Response to Monette-Shaw Ethics Commission Request**  
[Same as Enclosure 7 in Previous Sunshine Complaint]

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



# 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 #11014

Dear Mr. Rustom:

This correspondence is in response to the above-referenced complaint. Patrick Monette-Shaw requested records of: 1) Ethics Commission investigative file(s) regarding the patient gift fund complaint; and 2) closing memo(s) authored by the Ethics Commission staff regarding this LHH patient gift fund complaint.

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](mailto:DerekOnVanNess@aol.com)

Maria Rivero, MD  
(cell: 925-451-1454)  
522 Valley Street  
San Francisco, CA  
[missforties@hotmail.com](mailto: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](mailto: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: #11014: Response to Ethics Rebuttal – Executive Summary**

Dear Mr. Rustom,

This letter provides supporting documentation to SOTF Complaint #11014, and is a response to the Ethics Commissions' rebuttal dated March 23, 2011 from Richard Mo.

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.

He further 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.

Further, Mo 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.

Further, the courts have limited the §6254(f) exemption to offices and agencies that have police investigative power, which the Ethics Commission does not have. The Ethics Commission is just another agency as far as CPRA is concerned.

As I noted in my initial March 6 complaint (#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 Laws<sup>1</sup> [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.

Mo, and the Ethics Commission have cited no state or federal statute 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.

<sup>1</sup> *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.

April 10, 2011

Re: #11014: Response to Ethics Rebuttal – Executive Summary

Page 2

Invocation of the “Interests of Justice” exemption under the Official Information exemption has been ruled<sup>2</sup> 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 claims 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 assertions.

I draw the Task Force’s attention to additional discussion I presented in my initial March 6 complaint (#11014).

Sincerely,

[Signed]

Patrick Monette-Shaw

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