

Date: May 18, 2010

Item No. 1 & 2

File No. 11014

SUNSHINE ORDINANCE TASK FORCE

AGENDA PACKET CONTENTS LIST*

- Patrick Monette-Shaw against the Ethics Commission**
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Completed by: Chris Rustom

Date: May 13, 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.

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 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 No¹

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* 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).

Despite the fact that "refusal to disclose public records must be based on specific exemptions set forth in the CPRA³," 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

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.

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.

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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 not 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 — 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." 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). 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. 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 Laws ⁴ [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." 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 4.

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 3.

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Enclosure:	Summary and Discussion
	<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 silent⁶.”</p> <p>“Section C3.699-13, which mandates investigations and provides that investigation records be kept confidential, applies only to the Ethics Laws⁷.” 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>

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*.

⁶ 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.

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.

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- “Refusal to disclose public records must be based on specific exemptions set forth in the CPRA⁸.
- As the *Allen Grossman vs. San⁹ 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. San¹⁰ 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**

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 5.

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 8.

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 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.

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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
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 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
Sender: Steven.Massey@SFGOV.ORG
Date: 2/8/2011 3:16 PM
To: Pmonette-shaw@earthlink.net

Dear Mr. Monette-Shaw:

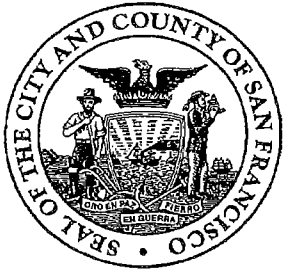
This is a response to your February 6, 2011, Immediate Disclosure Request which we received on Monday, February 7, 2011.

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



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

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: #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 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.

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.

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.

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

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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 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

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