

Date: May 24, 2011

Item No. 9 & 10
File No. 11031

SUNSHINE ORDINANCE TASK FORCE

AGENDA PACKET CONTENTS LIST*

- Charles Pitts against Supervisor Sean Elsbernd**
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Completed by: Chris Rustom

Date: May 20, 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
PRIVILEGED AND CONFIDENTIAL**

TO: Sunshine Task Force
FROM: Jana Clark
Deputy City Attorney
DATE: May 19, 2011
RE: *Complaint No. 11031, Pitts v. Supervisor Sean Elsbernd*

COMPLAINT

THE COMPLAINANT ALLEGES THE FOLLOWING:

Complainant Charles Pitts ("Complainant") alleges that Supervisor Sean Elsbernd (the "Supervisor") failed to timely respond to an immediate disclosure request for public records of communications between his office and any individual concerning the Shelter Monitoring Committee applicants for 2011.

COMPLAINANT FILES COMPLAINT:

On April 5, 2011, Complainant filed a Complaint against the Supervisor for his alleged violations of Sections 67.25(b) of the Sunshine Ordinance.

JURISDICTION

The Supervisor is a member of a City department under the San Francisco City Charter, and thus the Task Force has jurisdiction over this issue.

APPLICABLE STATUTORY SECTION(S):

Section 67 et seq. of the San Francisco Administrative Code:

- Section 67.21 governs responses to a public records request and the format of requests and of responsive documents.
- Section 67.24 governs public information that must be disclosed.
- Section 67.25 governs immediate disclosure requests.

Section 6250 et seq. of the Cal. Gov't Code

- Section 6253 governs public records requests and time of response.
- Section 6254 governs what records are exempt from disclosure requirements

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ISSUES TO BE DETERMINED:

Contested/Uncontested Facts: Complainant alleges that he made an immediate disclosure request on March 21, 2011, and that the Supervisor did not respond after the date for an extension had expired. In particular, Complainant alleges that the Supervisor failed to timely respond to an immediate disclosure request for public records of communications between his office and any individual concerning the Shelter Monitoring Committee applicants for 2011.

On May 2, 2011, the Supervisor filed a response to the complaint noting that two pages of handwritten notes pertaining to applicants for the Shelter Monitoring Committee and other matters had been provided to Complainant. The Supervisor responded further that the notes had been redacted to withhold the following: (1) personal phone numbers of members of the public who called the Supervisor; (2) comments relating to "purely personal" matters of the Supervisor or other member of his office that were completely unrelated to the Shelter Monitoring Committee or its applicants; and (3) the names of persons that provided information regarding Shelter Monitoring Committee appointments.

According to the Supervisor, the redacted information was withheld on privacy grounds relying on Government Code 6254(c) (personnel, medical, or similar files) and (k) (prohibiting disclosure where it would violate state or federal law), pursuant to Evidence Code section 1040, which, he alleges allows a public entity to refuse to disclose information acquired in confidence where disclosure is against the public interest, and to protect the right to petition an elected representative anonymously.

QUESTIONS THAT MIGHT ASSIST THE TASK FORCE:

- Were persons that contacted the Supervisor concerning Shelter Monitoring Committee applicants for 2011 assured that their names and contact information would be confidential?

LEGAL ISSUES/LEGAL DETERMINATIONS:

- Was redaction of the notes to omit names and phone numbers proper to protect the right to privacy of the members of the public that contacted the committee?
- Was redaction of the notes to withhold comments relating to "purely personal" matters of the Supervisor or other member of his office allowed under the Ordinance?
- Pursuant to Evidence Code section 1040, does the public interest in withholding the information outweigh the public interest in disclosure?
- Were sections of the Sunshine Ordinance, Brown Act, and/or California Constitution Article I, Section three violated?

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SUGGESTED ANALYSIS:

- Determine whether the Department timely responded to the request.
- Determine whether the redacted information was properly withheld on privacy grounds.
- Determine whether the redacted information was properly withheld in reliance on Evidence Code section 1040.
- Determine whether the redacted information was properly withheld to protect the right of members of the public to petition their elected representative anonymously?

APPLICABLE CASE AND STATUTORY AW:

Board of Trustees of Leland Stanford Junior University et al. v. Superior Court of Santa Clara County (1981) 119 Cal.App.3d 516 ("*Stanford*").

In defense of the redaction of information from the records disclosed to Complainant, the Supervisor relies on *Stanford*. In *Stanford*, a university professor filed a defamation lawsuit against another professor. In discovery, the plaintiff requested the university's personnel, tenure, and promotion files of both professors. The court held that the university could not be compelled to disclose communications considered by the university's committees in investigating the matter, in part, because the communications were within the constitutionally protected area of privacy in that they were tendered under a guarantee of confidentiality. It held further that the university could not be compelled to disclose personnel, tenure, and promotion files of the plaintiff when he was being considered for employment insofar as any compelled disclosure, "failed to provide appropriate protection of the privacy interests of those who had furnished confidential information for the files[.]" (*Id.* at p. 533) Finally, the court held that absent a compelling state purpose for confidentiality, the content of communications could be compelled, "subject to protection of their authors by withholding their names and other identification." The court's holding was based on its conclusion that communications tendered under a guarantee of confidentiality are "manifestly within the Constitution's protected area of privacy."

Evidence Code section 1040

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."

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Civil Code section 1798.38

Civil Code section 1798.38 governs the protection of privacy with respect to the dissemination of personal information provides and provides:

If information, including letters of recommendation, compiled for the purpose of determining suitability, eligibility, or qualifications for employment, advancement, renewal of appointment or promotion, status as adoptive parents, or for the receipt of state contracts, or for licensing purposes, was received with the promise or, prior to July 1, 1978, with the understanding that the identity of the source of the information would be held in confidence and the source is not in a supervisory position with respect to the individual to whom the record pertains, the *agency* shall fully inform the individual of all personal information about that individual without identification of the source. This may be done by providing a copy of the text of the material with only such deletions as are necessary to protect the identity of the source or by providing a comprehensive summary of the substance of the material. Whichever method is used, the *agency* shall insure that full disclosure is made to **the subject of any personal information** that could reasonably in any way reflect or convey anything detrimental, disparaging, or threatening to an individual's reputation, rights, benefits, privileges, or qualifications, or be used by an agency to make a determination that would affect an individual's rights, benefits, privileges, or qualifications. In institutions of higher education, "supervisory positions" shall not be deemed to include chairpersons of academic departments.

Section 1798.38 is a part of the Information Practices Act of 1977, Civil Code Sections 1798, et seq. Section 1798.3(b) of that act defines "agency" to mean every "*state* office, officer, department, division, bureau, board, commission, or other state agency[.]" Thus, the law would not appear to directly apply to local governmental agencies or departments. Nevertheless, the law could be used to bolster the argument that the public interest in protecting privacy outweighs the interest in disclosure.

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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**SEC. 67.21. PROCESS FOR GAINING ACCESS TO PUBLIC RECORDS;
ADMINISTRATIVE APPEALS.**

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

(b) A *custodian of a public record* shall, as soon as possible and within ten days following receipt of a request for inspection or copy of a public record, comply with such request. Such request may be delivered to the office of the custodian by the requester orally or in writing by fax, postal delivery, or e-mail. If the custodian believes the record or information requested is not a public record or is exempt, the custodian shall justify withholding any record by demonstrating, in writing as soon as possible and within ten days following receipt of a request, that the record in question is exempt under express provisions of this ordinance.

(c) A *custodian of a public record* shall assist a requester in identifying the existence, form, and nature of any records or information maintained by, available to, or in the custody of the custodian, whether or not the contents of those records are exempt from disclosure and shall, when requested to do so, provide in writing within seven days following receipt of a request, a statement as to the existence, quantity, form and nature of records relating to a particular subject or questions with enough specificity to enable a requester to identify records in order to make a request under (b). A custodian of any public record, when not in possession of the record requested, shall assist a requester in directing a request to the proper office or staff person.

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

(e) If the custodian refuses, fails to comply, or incompletely complies with a request described in (b) above or if a petition is denied or not acted on by the supervisor of public records, the person making the request may petition the Sunshine Task Force for a determination whether the record requested is public. The Sunshine Task Force shall inform the petitioner, as soon as possible and within 2 days after its next meeting but in no case later than 45 days from when a petition in writing is received, of its determination whether the record requested, or any part of 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,

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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.

(f) The administrative remedy provided under this article shall in no way limit the availability of other administrative remedies provided to any person with respect to any officer or employee of any agency, executive office, department or board; nor shall the administrative remedy provided by this section in any way limit the availability of judicial remedies otherwise available to any person requesting a public record. If a custodian of a public record refuses or fails to comply with the request of any person for inspection or copy of a public record or with an administrative order under this section, the *superior court* shall have jurisdiction to order compliance.

(g) In any court proceeding pursuant to this article there shall be a presumption that the record sought is public, and the burden shall be upon the custodian to prove with specificity the exemption which applies.

(h) On at least an annual basis, and as otherwise requested by the Sunshine Ordinance Task Force, the supervisor of public records shall prepare a tally and report of every petition brought before it for access to records since the time of its last tally and report. The report shall at least identify for each petition the record or records sought, the custodian of those records, the ruling of the supervisor of public records, whether any ruling was overturned by a court and whether orders given to custodians of public records were followed. The report shall also summarize any court actions during that period regarding petitions the Supervisor has decided. At the request of the Sunshine Ordinance Task Force, the report shall also include copies of all rulings made by the supervisor of public records and all opinions issued.

(i) The San Francisco City Attorney's office shall act to protect and secure the rights of the people of San Francisco to access public information and public meetings and shall not act as legal counsel for any city employee or any person having custody of any public record for purposes of denying access to the public. The City Attorney may publish legal opinions in response to a request from any person as to whether a record or information is public. All communications with the City Attorney's Office with regard to this ordinance, including petitions, requests for opinion, and opinions shall be public records.

(j) Notwithstanding the provisions of this section, the City Attorney may defend the City or a City Employee in litigation under this ordinance that is actually filed in court to any extent required by the City Charter or California Law.

(k) Release of documentary public information, whether for inspection of the original or by providing a copy, shall be governed by the California Public Records Act (Government Code Section 6250 et seq.) in particulars not addressed by this ordinance and in accordance with the enhanced disclosure requirements provided in this ordinance.

(l) Inspection and copying of documentary public information stored in electronic form shall be made available to the person requesting the information in any form requested which is available to or easily generated by the department, its officers or employees, including disk, tape, printout or monitor at a charge no greater than the cost of the media on which it is duplicated. Inspection

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of documentary public information on a computer monitor need not be allowed where the information sought is necessarily and inseparably intertwined with information not subject to disclosure under this ordinance. Nothing in this section shall require a department to program or reprogram a computer to respond to a request for information or to release information where the release of that information would violate a licensing agreement or copyright law.

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:

(a) Drafts and Memoranda.

(1) Except as provided in subparagraph (2), no preliminary draft or department memorandum, whether in printed or electronic form, shall be exempt from disclosure under Government Code Section 6254, subdivision (a) or any other provision. If such a document is not normally kept on file and would otherwise be disposed of, its factual content is not exempt under subdivision (a). Only the recommendation of the author may, in such circumstances, be withheld as exempt.

(2) Draft versions of an agreement being negotiated by representatives of the City with some other party need not be disclosed immediately upon creation but must be preserved and made available for public review for 10 days prior to the presentation of the agreement for approval by a policy body, unless the body finds that and articulates how the public interest would be unavoidably and substantially harmed by compliance with this 10 day rule, provided that policy body as used in this subdivision does not include committees. In the case of negotiations for a contract, lease or other business agreement in which an agency of the City is offering to provide facilities or services in direct competition with other public or private entities that are not required by law to make their competing proposals public or do not in fact make their proposals public, the policy body may postpone public access to the final draft agreement until it is presented to it for approval.

(b) Litigation Material.

(1) Notwithstanding any exemptions otherwise provided by law, the following are public records subject to disclosure under this Ordinance:

(i) A pre-litigation claim against the City;

(ii) A record previously received or created by a department in the ordinary course of business that was not attorney/client privileged when it was previously received or created;

(iii) Advice on compliance with, analysis of, an opinion concerning liability under, or any communication otherwise concerning the California Public Records Act, the Ralph M. Brown Act, the Political Reform Act, any San Francisco governmental ethics code, or this Ordinance.

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(2) Unless otherwise privileged under California law, when litigation is finally adjudicated or otherwise settled, records of all communications between the department and the adverse party shall be subject to disclosure, including the text and terms of any settlement.

(c) Personnel Information. None of the following shall be exempt from disclosure under Government Code Section 6254, subdivision (c), or any other provision of California Law where disclosure is not forbidden:

(1) The job pool characteristics and employment and education histories of all successful job applicants, including at a minimum the following information as to each successful job applicant:

(i) Sex, age and ethnic group;

(ii) Years of graduate and undergraduate study, degree(s) and major or discipline;

(iii) Years of employment in the private and/or public sector;

(iv) Whether currently employed in the same position for another public agency.

(v) Other non-identifying particulars as to experience, credentials, aptitudes, training or education entered in or attached to a standard employment application form used for the position in question.

(2) The professional biography or curriculum vitae of any employee, provided that the home address, home telephone number, social security number, age, and marital status of the employee shall be redacted.

(3) The job description of every employment classification.

(4) The exact gross salary and City-paid benefits available to every employee.

(5) Any memorandum of understanding between the City or department and a recognized employee organization.

(6) The amount, basis, and recipient of any performance-based increase in compensation, benefits, or both, or any other bonus, awarded to any employee, which shall be announced during the open session of a policy body at which the award is approved.

(7) The record of any confirmed misconduct of a public employee involving personal dishonesty, misappropriation of public funds, resources or benefits, unlawful discrimination against another on the basis of status, abuse of authority, or violence, and of any discipline imposed for such misconduct.

(d) Law Enforcement Information.

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The District Attorney, Chief of Police, and Sheriff are encouraged to cooperate with the press and other members of the public in allowing access to local records pertaining to investigations, arrests, and other law enforcement activity. However, no provision of this ordinance is intended to abrogate or interfere with the constitutional and statutory power and duties of the District Attorney and Sheriff as interpreted under Government Code section 25303, or other applicable state law or judicial decision. 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, or once the statute of limitations for filing charges has expired, whichever occurs first. Notwithstanding the occurrence of any such event, individual items of information in the following categories may be segregated and withheld if, on the particular facts, the public interest in nondisclosure clearly and substantially outweighs the public interest in disclosure:

- (1) The names of juvenile witnesses (whose identities may nevertheless be indicated by substituting a number or alphabetical letter for each individual interviewed);
- (2) Personal or otherwise private information related to or unrelated to the investigation if disclosure would constitute an unwarranted invasion of privacy;
- (3) The identity of a confidential source;
- (4) Secret investigative techniques or procedures;
- (5) Information whose disclosure would endanger law enforcement personnel; or
- (6) Information whose disclosure would endanger the successful completion of an investigation where the prospect of enforcement proceedings is concrete and definite.

This subdivision shall not exempt from disclosure any portion of any record of a concluded inspection or enforcement action by an officer or department responsible for regulatory protection of the public health, safety, or welfare.

(e) Contracts, Bids and Proposals

(1) Contracts, contractors' bids, responses to requests for proposals and all other records of communications between the department and persons or firms seeking contracts shall be open to inspection immediately after a contract has been awarded. Nothing in this provision requires the disclosure of a private person's or organization's net worth or other proprietary financial data submitted for qualification for a contract or other benefit until and unless that person or organization is awarded the contract or benefit. All bidders and contractors shall be advised that information provided which is covered by this subdivision will be made available to the public upon request. Immediately after any review or evaluation or rating of responses to a Request for Proposal ("RFP") has been completed, evaluation forms and score sheets and any other documents used by persons in the RFP evaluation or contractor selection process shall be

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available for public inspection. The names of scorers, graders or evaluators, along with their individual ratings, comments, and score sheets or comments on related documents, shall be made immediately available after the review or evaluation of a RFP has been completed.

(2) Notwithstanding the provisions of this subdivision or any other provision of this ordinance, the Director of Public Health may withhold from disclosure proposed and final rates of payment for managed health care contracts if the Director determines that public disclosure would adversely affect the ability of the City to engage in effective negotiations for managed health care contracts. The authority to withhold this information applies only to contracts pursuant to which the City (through the Department of Public Health) either pays for health care services or receives compensation for providing such services, including mental health and substance abuse services, to covered beneficiaries through a pre-arranged rate of payment. This provision also applies to rates for managed health care contracts for the University of California, San Francisco, if the contract involves beneficiaries who receive services provided jointly by the City and University. This provision shall not authorize the Director to withhold rate information from disclosure for more than three years.

(3) During the course of negotiations for:

- (i) personal, professional, or other contractual services not subject to a competitive process or where such a process has arrived at a stage where there is only one qualified or responsive bidder;
- (ii) leases or permits having total anticipated revenue or expense to the City and County of five hundred thousand dollars (\$500,000) or more or having a term of ten years or more; or
- (iii) any franchise agreements,

all documents exchanged and related to the position of the parties, including draft contracts, shall be made available for public inspection and copying upon request. In the event that no records are prepared or exchanged during negotiations in the above-mentioned categories, or the records exchanged do not provide a meaningful representation of the respective positions, the city attorney or city representative familiar with the negotiations shall, upon a written request by a member of the public, prepare written summaries of the respective positions within five working days following the final day of negotiation of any given week. The summaries will be available for public inspection and copying. Upon completion of negotiations, the executed contract, including the dollar amount of said contract, shall be made available for inspection and copying. At the end of each fiscal year, each City department shall provide to the Board of Supervisors a list of all sole source contracts entered into during the past fiscal year. This list shall be made available for inspection and copying as provided for elsewhere in this Article.

(f) Budgets and Other Financial Information. Budgets, whether tentative, proposed or adopted, for the City or any of its departments, programs, projects or other categories, and all bills, claims, invoices, vouchers or other records of payment obligations as well as records of actual disbursements showing the amount paid, the payee and the purpose for which payment is made,

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other than payments for social or other services whose records are confidential by law, shall not be exempt from disclosure under any circumstances.

(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. (Added by Ord. 265-93, App. 8/18/93; amended by Ord. 292-95, App. 9/8/95; Ord. 240-98, App. 7/17/98; Proposition G, 11/2/99)

SEC. 67.25. IMMEDIACY OF RESPONSE.

(a) Notwithstanding the 10-day period for response to a request permitted in Government Code Section 6256 and in this Article, a written request for information described in any category of non-exempt public information shall be satisfied no later than the close of business on the day following the day of the request. This deadline shall apply only if the words "Immediate Disclosure Request" are placed across the top of the request and on the envelope, subject line, or cover sheet in which the request is transmitted. Maximum deadlines provided in this article are appropriate for more extensive or demanding requests, but shall not be used to delay fulfilling a simple, routine or otherwise readily answerable request.

(b) If the voluminous nature of the information requested, its location in a remote storage facility or the need to consult with another interested department warrants an extension of 10 days as provided in Government Code Section 6456.1, the requester shall be notified as required by the close of business on the business day following the request.

(c) The person seeking the information need not state his or her reason for making the request or the use to which the information will be put, and requesters shall not be routinely asked to make such a disclosure. Where a record being requested contains information most of which is exempt from disclosure under the California Public Records Act and this article, however, the City Attorney or custodian of the record may inform the requester of the nature and extent of the non-exempt information and inquire as to the requester's purpose for seeking it, in order to suggest alternative sources for the information which may involve less redaction or to otherwise prepare a response to the request.

(d) Notwithstanding any provisions of California Law or this ordinance, in response to a request for information describing any category of non-exempt public information, when so requested, the City and County shall produce any and all responsive public records as soon as reasonably

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possible on an incremental or "rolling" basis such that responsive records are produced as soon as possible by the end of the same business day that they are reviewed and collected. This section is intended to prohibit the withholding of public records that are responsive to a records request until all potentially responsive documents have been reviewed and collected. Failure to comply with this provision is a violation of this article.

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.

CAL. PUBLIC RECORDS ACT (GOVT. CODE §§ 6250, ET SEQ.)

SECTION 6253

(c) Each agency, upon a request for a copy of records, shall, within 10 days from receipt of the request, determine whether the request, in whole or in part, seeks copies of disclosable public records in the possession of the agency and shall promptly notify the person making the request of the determination and the reasons therefor. In unusual circumstances, the time limit prescribed in this section may be extended by written notice by the head of the agency or his or her designee to the person making the request, setting forth the reasons for the extension and the date on which a determination is expected to be dispatched. No notice shall specify a date that would result in an extension for more than 14 days. When the agency dispatches the determination, and if the agency determines that the request seeks disclosable public records, the agency shall state the estimated date and time when the records will be made available. As used in this section, "unusual circumstances" means the following, but only to the extent reasonably necessary to the proper processing of the particular request:

- (1) The need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request.
- (2) The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records that are demanded in a single request.
- (3) The need for consultation, which shall be conducted with all practicable speed, with another agency having substantial interest in the determination of the request or among two or more components of the agency having substantial subject matter interest therein.
- (4) The need to compile data, to write programming language or a computer program, or to construct a computer report to extract data.

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(d) Nothing in this chapter shall be construed to permit an agency to delay or obstruct the inspection or copying of public records. The notification of denial of any request for records required by Section 6255 shall set forth the names and titles or positions of each person responsible for the denial.

SECTION 6254

§ 6254. Records exempt from disclosure requirements

Except as provided in Sections 6254.7 and 6254.13, nothing in this chapter shall be construed to require disclosure of records that are any of the following:

(a) Preliminary drafts, notes, or interagency or intra-agency memoranda that are not retained by the public agency in the ordinary course of business, if the public interest in withholding those records clearly outweighs the public interest in disclosure.

...

(c) Personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy.

...

(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.

ARTICLE 2. OTHER EXEMPTIONS FROM DISCLOSURE

III. § 6275. LEGISLATIVE INTENT; EFFECT OF LISTING IN ARTICLE

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

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

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

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

...

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

**MEMORANDUM
PRIVILEGED & CONFIDENTIAL**

TO: Sunshine Task Force
 DATE: May 19, 2011
 PAGE: 14
 RE: *Complaint No. 11031, Pitts v. Supervisor Sean Elsbernd*

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.

THE CALIFORNIA CONSTITUTION AS AMENDED BY PROPOSITION 59 IN 2004 PROVIDES FOR OPENNESS IN GOVERNMENT.

Article I Section 3 provides:

a) The people have the right to instruct their representative, petition government for redress of grievances, and assemble freely to consult for the common good.

b)(1) The people have the right of access to information concerning the conduct of the people's business, and therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny.

2) A statute, court rule, or other authority, including those in effect on the effective date of this subdivision that limits the right of access shall be adopted with findings demonstrating the interest protect by the limitation and the need for protecting that interest.

3) Nothing in this subdivision supersedes or modifies the right of privacy guaranteed by Section 1 or affects the construction of any statute, court rule, or other authority to the extent that it protects that right to privacy, including any statutory procedures governing discovery or disclosure of information concerning the official performance or professional qualifications of a peace officer.

4) Nothing in this subdivision supersedes or modifies any provision of this Constitution, including the guarantees that person may not be deprived of life, liberty, or property without due process of law, or denied equal protection of the laws, as provided by Section 7.

5) This subdivision does not repeal or nullify, expressly or by implication, any constitutional or statutory exception to the right of access to public records or meetings or public bodies that is in effect on the effective date of this subdivision, including, but not limited to, any statute protecting the confidentiality of law enforcement and prosecution records.

6) Nothing in this subdivision repeals, nullifies, supersedes, or modifies protections for the confidentiality of proceedings and records of the Legislature, the Members of the Legislature, and its employees, committee, and caucuses provided by Section 7 of Article IV, state law, or legislative rules adopted in furtherance of those provisions: nor does it affect the scope of

**MEMORANDUM
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permitted discovery in judicial or administrative proceedings regarding deliberations of the Legislature, the Members of the Legislature, and its employees, committees, and caucuses.

SAN FRANCISCO ADMINISTRATIVE CODE
67.25.A

**IMMEDIATE INFORMATION DISCLOSURE REQUEST
AND
CALIFORNIA PUBLIC RECORDS ACT**

Sean Elsbernd

Pursuant to the Sunshine Ordinance and the Public Records Act, please consider this an Immediate Disclosure Request for any and all, communications, emails, letters, phone calls and calendars, between your office and anyone else concerning the Shelter Monitoring Committee applicants for 2011. Included in your response should be any and all communications with the applicants as well.

Thank you in advance for your cooperation.
Charles Pitts

Charles Pitts
1 415 368 2354

RECEIVED
BOARD OF SUPERVISORS
SAN FRANCISCO
2011 MAR 21 PM 3:43
BY _____



RECEIVED
BOARD OF SUPERVISORS
SAN FRANCISCO
2011 APR -5 PM 12:07
BY: [Signature]

SUNSHINE ORDINANCE TASK FORCE
1 Dr. Carlton B. Goodlett Place, Room 244, San Francisco CA 94102
Tel. (415) 554-7724; Fax (415) 554-7854
<http://www.sfgov.org/sunshine>

SUNSHINE ORDINANCE COMPLAINT

Complaint against which Department or Commission SEAN EISBERND

Name of individual contacted at Department or Commission SEAN EISBERND

Alleged violation public records access
 Alleged violation of public meeting. Date of meeting _____

Sunshine Ordinance Section G7.25.B
(If known, please cite specific provision(s) being violated)

Please describe alleged violation. Use additional paper if needed. Please attach any relevant documentation supporting your complaint.

did not receive information after ~~request~~
request for information extinction

Do you want a public hearing before the Sunshine Ordinance Task Force? yes no
Do you also want a pre-hearing conference before the Complaint Committee? yes no

(Optional)¹
Name Citizens Pitts Address _____

Telephone No. _____ E-Mail Address (A) yatto.com

Date _____ Signature _____

I request confidentiality of my personal information. yes no

¹ NOTICE: PERSONAL INFORMATION THAT YOU PROVIDE MAY BE SUBJECT TO DISCLOSURE UNDER THE CALIFORNIA PUBLIC RECORDS ACT AND THE SUNSHINE ORDINANCE, EXCEPT WHEN CONFIDENTIALITY IS SPECIFICALLY REQUESTED. YOU MAY LIST YOUR BUSINESS/OFFICE ADDRESS, TELEPHONE NUMBER AND E-MAIL ADDRESS IN LIEU OF YOUR HOME ADDRESS OR OTHER PERSONAL CONTACT INFORMATION. Complainants can be anonymous as long as the complainant provides a reliable means of contact with the SOTF (Phone number, fax number, or e-mail address).

Member, Board of Supervisors
District 7



City and County of San Francisco

SEAN R. ELSBERND

May 2, 2011

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

Re: Complaint by Charles Pitts

Dear Task Force Members:

This letter responds to the Sunshine Ordinance Complaint filed by Charles Pitts. The Complaint refers to a request by Mr. Pitts for "any and all, communications, emails, letters, phone calls and calendars, between your office and anyone else concerning the Shelter Monitoring Committee applicants for 2011."

In response to Mr. Pitts' request, the office produced two documents consisting of handwritten notes pertaining to applicants for the Shelter Monitoring Committee and other items.

The response stated:

"The only responsive records from our office are notes from telephone conversations, copies of which are enclosed. The notes are on a number of different topics, most do not relate to your request or the Shelter Monitoring Committee. Please note that we have redacted the following information: (1) personal phone numbers of members of the public who called this office; (2) comments that relate to purely personal matters of the Supervisor or other members of the office that are completely unrelated to the Shelter Monitoring Committee and/or the appointment of members to the committee, and completely unrelated to any other City business; and (3) the names of persons who provide information about Shelter Monitoring Committee appointments."

The redacted information was withheld on privacy grounds. Redactions are based on California Constitution, Article I, section I, and California Government Code Section 6254(k) and California Government Code Section 6254(c). These provisions guard against disclosure of information that would invade personal privacy, such as personal phone numbers and other personal information. Further, both the California Public Records Act (California Government Code Section 6250) and the San Francisco Sunshine Ordinance (San Francisco Administrative Code Section 67.1(g)) acknowledge the importance of protecting personal privacy where disclosing records in response to a public records request.

Moreover, under category three, California courts have approved the redaction of the names and contact information of those who provide information on a candidate for a position. See *Board of Trustees of Leland Stanford Junior University v. The Superior Court of Santa Clara County* (1981) 119 Cal.App.3d 516, 532-533. In this case, consistent with this case law, the identify of the source was redacted. The information in the third category also was withheld under California Evidence Code Section 1040 under the official information privilege (allowing a public entity to refuse to disclose information acquired in confidence where disclosure is against the public interest) and Article I, section 3 of the California Constitution (right to petition elected representative anonymously).

Sincerely,

A handwritten signature in black ink, appearing to read "Sean R. Elsbernd", written over a horizontal line.

Sean R. Elsbernd
Board of Supervisors

RECEIVED
BOARD OF SUPERVISORS
SAN FRANCISCO
2011 MAY 13 AM 11:29
JPL