

Date: May 26, 2009

Item No. 3

File No. 09016

## SUNSHINE ORDINANCE TASK FORCE

### AGENDA PACKET CONTENTS LIST\*

- Peter Green v Department of Public Health
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Completed by: Chris Rustom

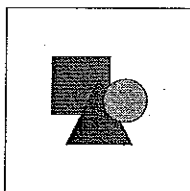
Date: May 15, 2009

**\*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, 2009*

*PETER GREEN v. DEPARTMENT OF PUBLIC HEALTH (09016)*

### COMPLAINT

#### THE COMPLAINANT ALLEGES THE FOLLOWING FACTS:

On March 6, 2009, Complainant Peter Green made an Immediate Disclosure Request to Dr. John Brown of Emergency Medical Services for the San Francisco Department of Public Health for all communication, including hard copy and e-mail, regarding the proposed Emergency Medical Services ("EMS") Regulations. Dr. Brown requested a 10 day extension.

On March 20, 2009, Dr. Brown stated that the communications are "protected Attorney-Client" communications. Peter Green alleges that no e-mails or other communications from companies, public or city agencies were provided.

#### COMPLAINANT FILES COMPLAINT:

On March 23, Peter Green filed his complaint against Emergency Medical Services and the Department of Public Health for violations of the State Public Records Act and the Sunshine Ordinance.

#### APPLICABLE STATUTORY SECTIONS:

1. City Administrative Code Section 67.21 addresses general requests for public documents.

**Memorandum**

2. Sunshine Ordinance, San Francisco Administrative Code Section 67.25 addresses Immediate Disclosure Requests.
3. City Administrative Code Section 67.27 addresses the justification for withholding of documents.
4. City Administrative Code Section 67.26 that states that withholding shall be kept to a minimum.
5. California Government Code Section 6253 addresses public records open to inspection.
6. California Government Code Section 6255 addresses the justification for withholding of documents...
7. California Government Code Section 6254(c) & (k) that provides for exemptions from disclosure where there is a citable privilege.
8. California Evidence Code Sections 950 et seq. that deals with attorney/client privilege.

**APPLICABLE CASE LAW: none**

**ISSUES TO BE DETERMINED****1. FACTUAL ISSUES****A. Uncontested Facts:**

- Peter Green made an IDR for all communications regarding the EMS regulations.
- Peter Green did not receive the requested information.
- The DPH did not provide the requested documents because it asserted that the documents were protected "Attorney-Client" communications.

**B. Contested facts/ Facts in dispute:**

The Task Force must determine what facts are true.

**i. Relevant facts in dispute:**

- Whether the documents requested were exempt from disclosure.

**Memorandum**

**QUESTIONS THAT MIGHT ASSIST IN DETERMINING FACTS:**

Were there any communications that were requested that did not involve the Department and its attorney?

**LEGAL ISSUES/LEGAL DETERMINATIONS;**

- **Were sections of the Sunshine Ordinance (Section 67.21), Brown Act, Public Records Act, and/or California Constitution Article I, Section three violated?**
- **Was there an exception to the Sunshine Ordinance, under State, Federal, or case law?**

**CONCLUSION**

THE TASK FORCE FINDS THE FOLLOWING FACTS TO BE TRUE:

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

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

**Memorandum**  
**ATTACHED STATUTORY SECTIONS FROM CHAPTER 67 OF THE SAN**  
**FRANCISCO ADMINISTRATIVE CODE (THE SUNSHINE ORDINANCE)**  
**UNLESS OTHERWISE SPECIFIED**

Section 67.1 addresses Findings and Purpose

The Board of Supervisors and the People of the City and County of San Francisco find and declare:

- (a) Government's duty is to serve the public, reaching its decisions in full view of the public.
- (b) Elected officials, commissions, boards, councils and other agencies of the City and County exist to conduct the people's business. The people do not cede to these entities the right to decide what the people should know about the operations of local government.
- (c) Although California has a long tradition of laws designed to protect the public's access to the workings of government, every generation of governmental leaders includes officials who feel more comfortable conducting public business away from the scrutiny of those who elect and employ them. New approaches to government constantly offer public officials additional ways to hide the making of public policy from the public. As government evolves, so must the laws designed to ensure that the process remains visible.
- (d) The right of the people to know what their government and those acting on behalf of their government are doing is fundamental to democracy, and with very few exceptions, that right supersedes any other policy interest government officials may use to prevent public access to information. Only in rare and unusual circumstances does the public benefit from allowing the business of government to be conducted in secret, and those circumstances should be carefully and narrowly defined to prevent public officials from abusing their authority.
- (e) Public officials who attempt to conduct the public's business in secret should be held accountable for their actions. Only a strong Open Government and Sunshine Ordinance, enforced by a strong Sunshine Ordinance Task Force can protect the public's interest in open government.
- (f) The people of San Francisco enact these amendments to assure that the people of the City remain in control of the government they have created.
- (g) Private entities and individuals and employees and officials of the City and County of San Francisco have rights to privacy that must be respected. However, when a person or entity is before a policy body or passive meeting body, that person, and the public, has the right to an open and public process.

### Memorandum

Section 67.21 addresses general requests for public documents.

This section provides:

a.) Every person having custody of any public record or public information, as defined herein, ... 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 (emphasis added) 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.

...

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 requirement 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 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.

Section 67.25 provides:

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



**Memorandum**

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 requestor 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 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.

Section 67.26 provides:

No record shall be withheld from disclosure in its entirety unless all information contained in it is exempt from disclosure under express provisions of the California Public Records Act or of some other statute. Information that is exempt from disclosure shall be masked, deleted or otherwise segregated in order that the nonexempt portion of a requested record may be released, and keyed by footnote or other clear reference to the appropriate justification for withholding required by section 67.27 of this article. This work shall be done personally by the attorney or other staff member conducting the exemption review. The work of responding to a public-records request and preparing documents for disclosure shall be considered part of the regular work duties of any city employee, and no fee shall be charged to the requester to cover the personnel costs of responding to a records request.

Section 67.27 provides:

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

**Memorandum**

the requester of the nature and extent of the nonexempt information and suggest alternative sources for the information requested, if available.

**The California Public Records Act is located in the state Government Code Sections 6250 et seq. All statutory references, unless stated otherwise, are to the Government Code.**

Section 6253 provides.

- a.) Public records are open to inspection at all times during the office hours of the state or local agency and every person has a right to inspect any public record, except as hereafter provided. Any reasonably segregable portion of a record shall be available for inspection by any person requesting the records after deletion of the portions that are exempted by law.
- b.) Except with respect to public records exempt from disclosure by express provisions of law, each state or local agency, upon a request for a copy of records that reasonably describes an identifiable record or records, shall make the records promptly available to any person upon payment of fees covering direct costs of duplication, or a statutory fee if applicable. Upon request, an exact copy shall be provided unless impracticable to do so.
- 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 therefore....

California Government Code Section 6255 addresses the justification for withholding of documents.

Section 6255 provides: California Government Code Section 6255 addresses the justification for withholding of documents.

- 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.
- b.) A response to a written request for inspection or copies of public records that includes a determination that the request is denied, in whole or in part, shall be in writing.

**California Evidence Code Section 954 defines the attorney-client privilege.** It provides;

Confidential communications between client and lawyer is exempt from disclosure. California law defines such confidential communication as "information transmitted between a client and his or her lawyer in the course of that relationship and in confidence".



<complaints@sfgov.org>  
03/23/2009 10:35 AM

To <soff@sfgov.org>  
cc  
bcc  
Subject Sunshine Complaint

Submitted on: 3/23/2009 10:35:59 AM

Department: Emergency Medical Services Section - Department of Public Health

Contacted: John Brown M.D.

Public\_Records\_Violation: Yes

Public\_Meeting\_Violation: No

Meeting\_Date:

Section(s)\_Violated: Immediate Disclosure, multiple sections of CPRA & Sunshine Act

Description: Request all communications, including hard copy and e-mail, regarding proposed EMS Regulations. Dr. Brown requested 10 day extension (per CPRA) day after request received on March 6. Received response to this and other Sunshine Requests on Friday, March 20th. None of the requests were answered. In regards to this request; Dr Brown states the communications are "protected Attorney-Client" communications. No e-mails or other communications from companies, public or city agencies were provided. Have filed new Sunshine/CPRA request this morning. Requesting your agencies assistance and that of the City Attorney's Office.

Hearing: Yes

Pre-Hearing: Yes

Date: March 23, 2009

Name: Peter Green

Address: PO Box 320356

City: San Francisco

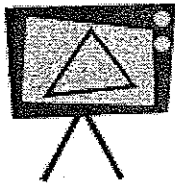
Zip: 94132

Phone: 4155051962

Email: fogcitypete@hotmail.com

Anonymous:

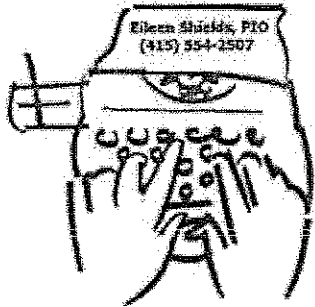
Confidentiality\_Requested: No



Eileen Shields/DPH/SFGOV  
04/28/2009 03:27 PM

To SOTF/SOTF/SFGOV@SFGOV  
cc John.Brown@sfdph.org, SOTF/SOTF/SFGOV@SFGOV  
bcc  
Subject Re: SOTF Hearing Reminder: #09016\_Peter Green v Health Dept

As Director of EMS, Dr. Brown is currently stationed at SFGH responding to the Swine Flu outbreak and state of emergency declared by the Governor and is unable to attend today's hearing.



SOTF/BOS/SFGOV



SOTF/BOS/SFGOV  
Sent by: SOTF  
04/24/2009 04:36 PM

To fogcitypete@hotmail.com, John.Brown@sfdph.org, Eileen Shields/DPH/SFGOV@SFGOV  
cc  
Subject SOTF Hearing Reminder: #09016\_Peter Green v Health Dept

This is a reminder that a hearing is scheduled with the Sunshine Ordinance Task Force, regarding the above titled complaint, to hear the merits of the complaint and to issue a determination.

Date: Tuesday, April 28, 2009  
Location: City Hall, Room 408  
Time: 4:00 p.m.

Complainants: Your attendance is required at this hearing.

Respondents/Departments: Pursuant to Section 67.21 (e) of the Ordinance, the custodian of records or a representative of your department, who can speak to the matter, is required at the hearing.

Attached is the DCA's Instructional Letter to the Task Force.



09016\_Instructional.pdf

To access the agenda please click on the link below. Then click on the associated item number to access the packet material related to your item.

[http://www.sfgov.org/site/sunshine\\_page.asp?id=103149](http://www.sfgov.org/site/sunshine_page.asp?id=103149)

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Eileen Shields/DPH/SFGOV  
04/28/2009 03:37 PM

To SOTF/SOTF/SFGOV@SFGOV  
cc John Brown/DPH/SFGOV@SFGOV  
bcc  
Subject Fw: Freedom of Information Act Request

Chris -- Here is what Dr. Brown sent to Mr. Green back on April 3 in response to his complaint. It would be perfectly acceptable to us if the SOTF can go ahead and deliberate this as Dr. Brown has already spent many hours addressing Mr. Green's very extensive request and followed up with him as below.

There are no more documents responsive to this request. Mr. Green has received everything he has requested.



----- Forwarded by Eileen Shields/DPH/SFGOV on 04/28/2009 03:27 PM -----

John Brown/DPH/SFGOV  
04/03/2009 06:03 PM

To fogcitypete@hotmail.com  
cc Eileen Shields  
Subject Freedom of Information Act Request



Dear Mr. Green:

I have been notified of your pending Sunshine Complaint regarding your allegation that you did not receive "all communications, including hard copy and e-mail, regarding proposed EMS Regulations." Because your requests for this information related to the EMS project was voluminous in nature, we spent a lot of staff hours reviewing and collecting the documents you asked for and turned over 30 documents and records to you, I was confident that we provided you with the information you were seeking. From the message of this complaint, evidently the information you are seeking is not found in the documents you were provided. Therefore, if you are aware of any documents or communications that exist which are subject to disclosure that you have not received, please notify my office and we will seek to provide these to you.

Subsequently I asked staff to review once again the documentation specifically related to correspondence and e-mail's to see if there were any that did not involve the City Attorney's office. I have identified eight e-mail messages on this topic that I exchanged with staff outside of the umbrella of the City Attorney's office. These e-mail's are attached. I apologize for our initial failure to send the e-mail's and can assure you this was a result of our focusing on providing you with the comprehensive documentation you were seeking and not a deliberate withholding of records.

Finally, the record should reflect that this agenda item has remained on the EMS agenda for 9 months. It is our intention to make this process as open as possible and, after reviewing the e-mail's attached, I

would ask that if you are still dissatisfied with our response that you help with process by specifying the documents you infer you have been denied.

John Brown, MD



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