

Date: July 22, 2008

Item No. 9a

File No. 08031

## SUNSHINE ORDINANCE TASK FORCE

### AGENDA PACKET CONTENTS LIST\*

- Complaint by: Crossman vs Ethics Commission**
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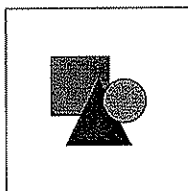
Completed by: Frank Darby

Date: July 16, 2008

**\*This list reflects the explanatory documents provided**

~ Late Agenda Items (documents received too late for distribution to the Task Force Members)

\*\* The document this form replaces exceeds 25 pages and will therefore not be copied for the packet. The original document is in the file kept by the Administrator, and may be viewed in its entirety by the Task Force, or any member of the public upon request at City Hall, Room 244.



DENNIS J. HERRERA  
City Attorney

ERNEST H. LLORENTE  
Deputy City Attorney

DIRECT DIAL: (415) 554-4236  
E-MAIL: ernest.llorente@sfgov.org

## MEMORANDUM

July 14, 2008

*KIMO CROSSMAN v. SAN FRANCISCO ETHICS COMMISSION (08031)*

### COMPLAINT

#### THE COMPLAINANT ALLEGES THE FOLLOWING FACTS:

On May 28, 2008, Kimo Crossman made an Immediate Disclosure Request ("IDR") on-line to the San Francisco Ethics Commission. Kimo Crossman requested all communications on the one Sunshine Ordinance Task Force referral that was sent to another body mentioned at a recent Board of Supervisors Rules Committee meeting by John St. Croix, Director of the Ethics Commission. On May 29, 2008, Richard Mo, Chief Enforcement Officer of the Ethics Commission and responded to the IDR a stated that the paper-only records were available for review and copying. On this date, Kimo Crossman requested that Mr. Mo have the documents scanned electronically and sent to him as an e-mail attachment. On this date, Mr. Mo replied and stated that he was under no obligation to scanned the records that were not in original PDF or electronic format. He repeated his offer that Kimo Crossman review the records in the office.

#### COMPLAINANT FILES COMPLAINT:

On June 3, 2008, Complainant Kimo Crossman filed a complaint against the Ethics Commission alleging that the Commission violated Sections 67.21-1 and 67.29-2 of the Sunshine Ordinance.

#### JURISDICTION

Based on the allegations of the complaint and the sections of the Ordinance stated below, the Task Force has jurisdiction to hear this matter. In addition the parties in this case do not contest jurisdiction.

#### APPLICABLE STATUTORY SECTION;

1. Sunshine Ordinance, San Francisco Administrative Code Section 67.1 addresses Findings and Purpose.
2. Sunshine Ordinance, San Francisco Administrative Code Section 67.21 addresses general requests for public documents including records in electronic format.
3. Sunshine Ordinance, San Francisco Administrative Code Section 67.21-1

**Memorandum**

addresses the policy regarding the use and purchase of computer systems.

4. Sunshine Ordinance, San Francisco Administrative Code Section. 67.29-2 deals Internet Access/World Wide Web Minimum Standards.
5. California Public Records Act, Government Code Section 6253.9 deal with information in an electronic format.
6. California Public Records Act, Government Code Section 6253 deals with public records open to inspection; agency duties and time limits. California Public Records Act, Government Code Section 6255 deals with justification for withholding of records.
7. California Constitution, Article I, Section 3 addresses Assembly, petition, open meetings.

**APPLICABLE CASE LAW:**

none

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

- Kimo Crossman requested certain paper records that the Ethic Commission made available for review following an IDR.
- Kimo Crossman requested that the records be scanned electronically and sent to him by e-mail.
- The Commission declined to scan to records.

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

The Task Force must determine what facts are true.

- i. **Relevant facts in dispute:** Whether the Commission has an obligation to scan paper records and send to requestor electronically.

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

none

**LEGAL ISSUES/LEGAL DETERMINATIONS;**

**Memorandum**

- **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

**CALIFORNIA STATE CONSTITUTION, ARTICLE I, SECTION 1**

## §1 Inalienable rights

All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.

**THE CALIFORNIA CONSTITUTION AS AMENDED BY PROPOSITION 59 IN 2004  
ARTICLE I, SECTION 3**

## §3 Openness in Government

- 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 protected 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

**Memorandum**

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.

**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.

**Memorandum**

- (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.

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.

...

**Memorandum**

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 unseparably 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 67.26 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 of elsewhere.



**Memorandum**

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.

Sunshine Ordinance Section 67.1 provides:

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.

San Francisco Charter section C3.699-13 provides:

The (Ethics) Commission's investigations shall be conducted in a confidential manner. Records of any investigations shall be considered confidential information to the extent permitted by state law.

**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

**Memorandum**

the agency and shall promptly notify the person making the request of the determination and the reasons therefore....

Section 6254(k) provides for certain records that are exempt from disclosure:

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.

Section 6254(c) provides for certain records that are exempt from disclosure:

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

Section 6255 provides:

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.



<complaints@sfgov.org>  
06/06/2008 04:26 PM

To <soft@sfgov.org>

cc

bcc

Subject Sunshine Complaint

History

This message has been forwarded.

Submitted on: 6/6/2008 4:26:41 PM

Department: Ethics Commission

Contacted: Richard Mo

Public\_Records\_Violation: Yes

Public\_Meeting\_Violation: No

Meeting\_Date:

Section(s)\_Violated: 67.21-1, 67.29-2

Description: I requested some paper-only discloseable records from Richard Mo and he is refusing to scan and email them to me. Says I must pay ten cents a copy or come in during business hours to inspect them. Below I have outlined the legal justification. Mr. Mo has provided no legal reason for refusal which is an additional violation

Hearing: Yes

Date: 6/3/08

Name: Kimo Crossman

Address:

City:

Zip:

Phone:

Email:

Anonymous:

Confidentiality\_Requested: Yes



"Kimo Crossman"  
<  
06/03/2008 05:50 PM

To "SOTF" <sotf@sfgov.org>  
"Richard Mo" <Richard.Mo@sfgov.org>,  
cc <ethics.commission@sfgov.org>, <Mabel.Ng@sfgov.org>,  
"John St.Croix" <john.st.croix@sfgov.org>  
bcc  
Subject SOTF Complaint -Richard MO - Ethics Refusal to scan  
paper public records

Please include the below email chain, images and attachments in the file for this complaint.

Submitted on: 6/3/2008

Department: Ethics Commission

Contacted: Richard Mo

Public\_Records\_Violation: Yes

Public\_Meeting\_Violation: No

Meeting\_Date:

Section(s)\_Violated: 67.21-1, 67-29-2

Description:

I requested some paper-only discloseable records from Richard Mo and he is refusing to scan and email them to me. Says I must pay ten cents a copy or come in during business hours to inspect them. Below I have outlined the legal justification. Mr. Mo has provided no legal reason for refusal which is an additional violation

Hearing: Yes

Date: 6/3/08

Name: Kimo Crossman

Email:

-----Original Message-----

From: Richard Mo [mailto:Richard.Mo@sfgov.org]

Sent: Monday, June 02, 2008 2:43 PM

To: Kimo Crossman

Subject: RE: Fw: immediate disclosure request - SOTF Referral sent to another body

Mr. Crossman:

We are not required to scan and create documents that were not originally in PDF or electronic form. Nor are we required to produce "incremental daily delivery" of scanned records which do not exist and for which we have no obligation to create.

Our original offer to provide you with scanned copies was done so out of courtesy. We have no obligation under the law to scan these records.

As stated in my response to your original immediate disclosure request, documents responsive to your request are available for your review during normal business hours, from 8:00 a.m. to 5:00 p.m., Monday through Friday, at our offices. If you wish to review these records, you are welcome to inspect them at our office. You can make copies for ten cents per page.

Richard Y. Mo, Chief Enforcement Officer  
San Francisco Ethics Commission  
City and County of San Francisco  
25 Van Ness Avenue, Suite 220  
San Francisco, CA 94102  
(P) 415.252.3103/(F) 415.252.3112  
richard.mo@sfgov.org  
[http://www.sfgov.org/site/ethics\\_index.asp](http://www.sfgov.org/site/ethics_index.asp)

"Kimo Crossman"  
<  
>  
To  
"Richard Mo"  
05/30/2008 12:19 PM <Richard.Mo@sfgov.org>  
cc  
Subject  
RE: Fw: immediate disclosure  
request - SOTF Referral sent to  
another body

Since you have the documents please consider this an IDR for the scan copies of them

As well as incremental daily delivery under 67.25 D

From: Kimo Crossman [mailto:\_\_\_\_\_ ]  
Sent: Thursday, May 29, 2008 3:52 PM  
To: 'Richard Mo'  
Subject: RE: Fw: immediate disclosure request - SOTF Referral sent to another body

Ok just to fill you in – scanning or faxing is actually required if requested not something that is optional.

As we know under 67.26 responding to public records request is part of the job duties of every city employee.

Under 67.21-1, It is city policy to reduce the cost, and ensure convenient, efficient and economic public access to records and make them easily accessible over the Internet, this is not limited to electronic records

#### SEC. 67.21-1. POLICY REGARDING USE AND PURCHASE OF COMPUTER SYSTEMS.

(a) It is the policy of the City and County of San Francisco to utilize computer technology in order to **reduce the cost** of public records management, including the costs of collecting, maintaining, and disclosing records subject to disclosure to members of the public under this section. To the extent that it is technologically and economically feasible, departments that use computer systems to collect and store public records shall program and design these systems to ensure convenient, efficient, and economical public access to records **and shall make public records (not limited to initially electronic records ) easily accessible over public networks such as the Internet.**

(b) Departments purchasing new computer systems shall attempt to reach the following goals as a means to **achieve lower costs to the public in connection with the public disclosure of records (not limited to initially electronic records )**: - *This policy has been in effect for eight years now so it should be standard for the city .*

(1) Implementing a computer system in which exempt information is segregated or

filed separately from otherwise discloseable information.

**(2) Implementing a system that permits reproduction of electronic copies of records (not limited to initially electronic records) in a format that is generally recognized as an industry standard format.**

(3) Implementing a system that permits **making records (not limited to initially electronic records ) available through the largest non-profit, non-proprietary public computer network**, consistent with the requirement for security of information.

Under 67.29-2 It is City policy for each department is encouraged to put as many documents (*not limited to initially electronic records* ) as possible online.

#### **SEC. 67.29-2. INTERNET ACCESS/WORLD WIDE WEB MINIMUM STANDARDS.**

Each department of the City and County of San Francisco shall maintain on a World Wide Web site, or on a comparable, readily accessible location on the Internet, information that it is required to make publicly available. **Each department is encouraged to make publicly available through its World Wide Web site, as much information and as many documents as possible concerning its activities.**

From: Kimo Crossman [mailto: ]  
Sent: Thursday, May 29, 2008 11:04 AM  
To: 'Richard Mo'  
Subject: RE: Fw: immediate disclosure request - SOTF Referral sent to another body

Ok then please scan and email them to me – it is hard for me to leave work during the day to participate in government.

-----Original Message-----

From: Richard Mo [mailto:Richard.Mo@sfgov.org]  
Sent: Thursday, May 29, 2008 10:56 AM  
To: Kimo Crossman

Subject: RE: Fw: immediate disclosure request - SOTF Referral sent to another body

Approximately 25-30.

Richard Y. Mo, Chief Enforcement Officer  
San Francisco Ethics Commission  
City and County of San Francisco  
25 Van Ness Avenue, Suite 220  
San Francisco, CA 94102  
(P) 415.252.3103/(F) 415.252.3112  
richard.mo@sfgov.org  
[http://www.sfgov.org/site/ethics\\_index.asp](http://www.sfgov.org/site/ethics_index.asp)

"Kimo Crossman"

<

>

To

"Richard Mo"

05/29/2008 10:42

<Richard.Mo@sfgov.org>

AM

cc

Subject

RE: Fw: immediate disclosure  
request - SOTF Referral sent to  
another body

How many are there?

-----Original Message-----



From: Richard Mo [mailto:Richard.Mo@sfgov.org]  
Sent: Thursday, May 29, 2008 10:32 AM  
To: kimo@webnetic.net  
Subject: Re: Fw: immediate disclosure request - SOTF Referral sent to another body

Mr. Crossman:

The documents responsive to your immediate disclosure request of May 28, 2008 will be available for your review at the Commission's office beginning at 4:00 p.m. today. Please let me know when you would like to come in to review these records.

Thank you,

Richard Y. Mo, Chief Enforcement Officer  
San Francisco Ethics Commission  
City and County of San Francisco  
25 Van Ness Avenue, Suite 220  
San Francisco, CA 94102  
(P) 415.252.3103/(F) 415.252.3112  
richard.mo@sfgov.org  
[http://www.sfgov.org/site/ethics\\_index.asp](http://www.sfgov.org/site/ethics_index.asp)

John  
St.Croix/ETHICS/S  
FGOV  
05/28/2008 03:15  
PM

To  
Richard Mo/ETHICS/SFGOV@SFGOV  
cc

Subject  
Fw: immediate disclosure request -  
SOTF Referral sent to another body

John St. Croix  
Executive Director, San Francisco Ethics Commission  
25 Van Ness Avenue, Suite 220  
San Francisco, CA 94102-6053

----- Forwarded by John St.Croix/ETHICS/SFGOV on 05/28/2008 03:17 PM -----

"Kimo Crossman"

<

>

To

"John St.Croix"

05/28/2008 03:04 <john.st.croix@sfgov.org>

PM

cc

<ethics.commission@sfgov.org> ,

<Mabel.Ng@sfgov.org>

Subject

immediate disclosure request - SOTF

Referral sent to another body

### Immediate Disclosure Request

Please provide all communications on the one SOTF referral that was sent to another body as mentioned at a recent BOS Rules committee meeting by Mr. St.Croix