

Date: July 26, 2011

Item No. 2
File No. 11013

SUNSHINE ORDINANCE TASK FORCE

AGENDA PACKET CONTENTS LIST*

- Patrick Monette-Shaw v Controller, Ethics Commission**
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Completed by: Chris Rustom

Date: July 21, 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.

**SUNSHINE ORDINANCE
TASK FORCE**



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ORDER OF DETERMINATION
June 14, 2011

DATE THE DECISION ISSUED
April 26, 2011

*PATRICK MONETT-SHAW V CONTROLLER'S OFFICE AND ETHICS COMMISSION
(CASE NO. 11013)*

FACTS OF THE CASE

Complainant Patrick Monette-Shaw alleges that the San Francisco Controller and the Ethics Commission violated the Ordinance by failing to provide records in response to his Immediate Disclosure Requests ("IDRs") for any and all written correspondence between the City Controller's Office and the Ethics Commission related to the Whistleblower Complaint filed by Dr. Derek Kerr and Dr. Maria Rivero regarding the Laguna Honda Hospital Patient Gift fund between the period of February 1, 2010, and December 31, 2010.

COMPLAINT FILED

On March 6, 2011, Mr. Monette-Shaw filed a complaint with the Task Force alleging that the departments violated Sections 67.24, 67.26, and 67.34 of the Ordinance.

HEARING ON THE COMPLAINT

On April 26, 2011, Mr. Monette-Shaw presented his case to the Task Force. The Controller's Office was represented by Tonia Lediju and Richard Mo represented the Ethics Commission.

Mr. Monette-Shaw said DCA Jerry Threet's Instructional letter to the Task Force states that the central issue is whether state law requires the disclosure of the records. He said DCA Threet also said that the California Public Records Act ("CPRA") makes most government documents public. He said Sunshine Ordinance Section 67.24(h) prohibits asserting exemptions for withholding documents based on the "deliberative process" exemption. He said the official information privilege faces two tests. The first is if the disclosure is forbidden by federal or state law and the second is to see if confidentiality outweighs the need for public disclosure. In both instances, he said, the Ethics Commission and the Controller's Office have not provided sufficient rationale. Sunshine Ordinance Section 67.24(i) eliminates the balancing test as an exemption, he said, adding that Evidence Code 1040 was not an available exemption for Ethics Commission and the Controller's Office because the documents are not "official information."

He added that Charter Section C3.699-13 does not apply to this case because it is directed only at finance, lobbying and conflict of interest cases. And, he said, the word whistleblower does not appear in the section. He said although Ms. Lediju has asserted that California Government Code Section 53087.6 applied because investigative audits are exempt from disclosure, his request was not for investigative audits but specifically for copies of correspondence between the Ethics Commission and the Controller's Office. Sec. 53087.6 provides for the identity of whistleblowers to be kept confidential and that can be accomplished through redaction rather than withholding, he said.

Ms. Lediju said the Controller's Office properly released its audit report and also properly kept any other documents confidential. She said that the San Francisco Charter provides that all records related to a whistleblower complaint are to be kept confidential. She said the Controller's Office also keeps whistleblowers investigations confidential under requirements of state law which allows disclosure only in limited circumstances. She said while whistleblowers may consent to have their identities revealed, they do not have the authority to release other information involved in the investigation. To do that, she said, may cause potential complainants not to come forward. She said besides rules and manuals that have to be followed when handling whistleblower cases, there is also an oversight committee that monitors the program. She added that the Controller's Office also does benchmarking with other entities across the United States at the state and local levels.

Mr. Moe said Charter Section C3.699 13-a provides that records of any whistleblower investigation by Ethics shall be considered confidential to the extent permitted by state law. He said DCA Threet's letter provides a roadmap as to why the Charter provision prevails over Sunshine in this case.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Judging from the evidence presented, the Task Force finds that the Controller's Office failed to respond to the IDR as required by the Sunshine Ordinance. Based on their conclusion that the CPRA trumps conflicting provisions of the Charter, the Task Force said the correspondence about who has or is handling the investigation must be released.

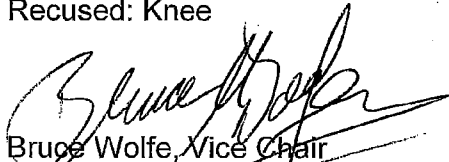
DECISION AND ORDER OF DETERMINATION

The Task Force first found that the Controller's Office violated Sunshine Ordinance Section 67.25 for untimely response to the IDR. In a separate motion, the Task Force also found the Ethics Commission and the Controller's Office in violation of Section 67.26 for not keeping withholding to a minimum and Section 67.27 for failure to justify the withholding. The departments shall release the records requested within 5 business days of the issuance of this Order and appear before the Compliance and Amendments Committee on July 12, 2011.

This Order of Determination was adopted by the Sunshine Ordinance Task Force on April 26, 2011, by the following vote:

Ayes: Manneh, Washburn, Costa, Chan, Johnson, West, Cauthen, Wolfe

Excused: Knoebber
Recused: Knee



Bruce Wolfe, Vice Chair
Sunshine Ordinance Task Force

- c: Patrick Monett-Shaw, Complainant
- Tonia Lediju, Respondent
- Richard Moe, Respondent
- Jerry Threet, Deputy City Attorney