

Date: July 26, 2011

Item No. 28

File No. _____

SUNSHINE ORDINANCE TASK FORCE

AGENDA PACKET CONTENTS LIST*

- Supervisor of Records Report**
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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.



DENNIS J. HERRERA
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MEMORANDUM

TO: Honorable Members
Sunshine Ordinance Task Force

FROM: Paula Jesson *PJ*
Deputy City Attorney

DATE: March 31, 2011

RE: Court Decisions Related to the Sunshine Ordinance
Companion to the Eleventh Annual Report of the Supervisor of Records
(October 1, 2009 – September 30, 2010)

RECEIVED
BOARD OF SUPERVISORS
SAN FRANCISCO
2011 MAR 31 PM 4:15
BY *PJ*

At the request of the Sunshine Ordinance Task Force, the City Attorney's Office agreed to report on court decisions in litigation to which the City is a party that relate to the San Francisco Sunshine Ordinance for the same period covered by, and as a companion to, the annual report of the Supervisor of Records.

The purpose of the report is to provide information on court decisions that specifically interpret or apply the Sunshine Ordinance. The report does not include court decisions involving both the California Public Records Act (or other state law) and the Sunshine Ordinance unless it is clear that some part of the decision is based on the Sunshine Ordinance.

For this reporting period, no such court decision issued.

P.J.



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MEMORANDUM

TO: Honorable Members
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DATE: March 31, 2011

RE: Eleventh Annual Report of the Supervisor of Records
October 1, 2009 – September 30, 2010

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The City Attorney's Office files this report under Section 67.21(h) of the San Francisco Sunshine Ordinance (S.F. Admin. Code §67.21(h)). That section requires the Supervisor of Records to prepare a tally and report for the Sunshine Ordinance Task Force at least annually on each petition brought before the Supervisor of Records for access to records or information. Section 67.21(h) requires as follows:

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.

Reporting period: This report covers petitions brought before the Supervisor of Records between October 1, 2009 and September 30, 2010 (the "reporting period").

Court actions: No court decisions issued regarding determinations by the Supervisor of Records for the reporting period.

Orders issued: The Supervisor of Records did not issue any orders to any City department whose records were the subject of a petition.

DESCRIPTION OF PETITIONS AND THEIR DISPOSITION

The petitions and their disposition are set forth below. For the custodian of records, the report generally gives the name of the employee who responded to the request. An appendix with copies of the determinations is attached, except where the petition was denied as moot because the department had provided the records. In some cases -- for more complex issues or where appropriate to provide context for the petition or the determination -- the appendix also contains additional communications regarding the petitions.

1. Petitioner: Kimo Crossman
Department: Ethics Commission

Memorandum

TO: Honorable Members
Sunshine Ordinance Task Force

DATE: March 31, 2011

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RE: Eleventh Annual Report of the Supervisor of Records
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Records sought: Records relating to the investigation of Mr. Crossman's Sunshine Ordinance Task Force complaints referred by the Task Force to the Ethics Commission

Custodian of Records: John St. Croix

Determination: Declined to issue a determination pending a court decision on the same issue; after the litigation settled, the Ethics Commission provided the records

Appendix: Pages 1-3

Mr. Crossman asked the Ethics Commission for records of investigations of complaints that he had made to the Sunshine Ordinance Task Force and that the Task Force had sent to the Ethics Commission. In response, Ethics Commission staff informed Mr. Crossman that the office was invoking an extension of time because the potentially responsive records were voluminous. Mr. Crossman then narrowed his request to "records for the first complaint – that may be all I need," but the Ethics Commission did not produce the requested records.

Mr. Crossman then filed a petition with the Supervisor of Records. The Supervisor of Records declined to respond to the petition because the records sought were the subject of a lawsuit filed against the San Francisco Ethics Commission brought under the California Public Records Act and the San Francisco Sunshine Ordinance (*Grossman v. San Francisco Ethics Commission et al.*, Case No. CPF-09-509868, San Francisco Superior Court). We informed Mr. Crossman that once the pending litigation was concluded, the Supervisor of Records would review the matter in light of the holding of the court and any actions taken by the Ethics Commission in response to it.

Mr. Crossman renewed his request for a determination, emphasizing that he was "not a party in any fashion to the lawsuit" and noting that he had narrowed the scope of his request. Mr. Crossman further argued as follows:

Also please note that you are required to direct Ethics to produce the records, validate their legal withholding or refer the illegal withholding after five days to relevant enforcement authorities. It does not appear to me that you have the ability under Sunshine to decline to rule within seven days¹ as required under Sunshine based on a pending legal dispute with another party. If I am wrong, please point me to language that allows you to withhold providing a ruling. Therefore please rule on the discloseability of the withheld records and the validity of the ethics commission's exemptions.

We disagreed with Mr. Crossman's position. The San Francisco Charter gives the City Attorney the responsibility for defending the City in litigation. S.F. Charter § 6.102. The Sunshine Ordinance recognizes and reaffirms this duty: "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." S.F. Admin. Code § 67.21(j).

¹ Although Mr. Crossman suggests that the Supervisor of Records must respond within 7 days, the Ordinance specifies 10 days. S.F. Admin Code § 67.21(d).

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The Sunshine Ordinance creates the position of Supervisor of Records in order to give citizens an expeditious and inexpensive method, short of litigation, to obtain review of a City department's response to a public records request. All laws must be construed to further the intent of those who adopted them. The most reasonable construction of the Sunshine Ordinance is that neither the drafters, nor the voters who adopted it, intended to require the City Attorney's Office to issue a determination as Supervisor of Records while simultaneously representing the City on the same issue in court.

Moreover, a determination by the Supervisor of Records is not a court decision. A court has the final say as to what the law means. As noted, it is unlikely that the Sunshine Ordinance was intended to require the City Attorney's Office to use its resources to issue an administrative determination when a lawsuit has been filed on the same issue and a court might render a final, and conclusive, decision on the matter.

About a month after the Supervisor of Records responded to the petition, the Ethics Commission and the plaintiff settled the lawsuit and the Ethics Commission provided Mr. Crossman with the records that he had requested.

2. Petitioner: Monio Pilpel
- Department: Planning Department
- Records sought: Records relating to property located at Sloat Blvd. & 19th
 Avenue and other permit-related materials
- Custodian of
 Records: Brian Smith
- Determination: Denied, in part because the matter had become moot and
 in part because the limited role of the Supervisor of
 Records does not extend to the issues raised
- Appendix: Pages 4-6

Mr. Pilpel asked the Planning Department for various categories of records: applications for and temporary permits issued to certain parties; applications for and temporary permits issued for property located at Sloat Boulevard and 19th Avenue; and summary logs, case files, and other records relating to those matters.

According to Mr. Pilpel's petition to the Supervisor of Records, the Department:

- Had been unable to locate responsive records in its initial search effort and only did so after Mr. Pilpel had identified staff members who had worked on matters related to the request;
- Failed to locate records in a timely manner;
- Informed Mr. Pilpel, when he visited the Department after receiving notice that the records were ready for his review, that staff would not allow him to inspect the records unless he submitted his driver's license, which would be held by the Department while he conducted the review;
- Informed Mr. Pilpel that staff would not make copies of the records for him, but that instead he would need to make the copies himself on copy machines made

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available at the Department, for which staff would charge ten cents a page. In response, Mr. Pilpel informed Department staff that he was willing to pay the copying costs, but was not willing to do the copying himself.

The Supervisor of Records discussed these issues with the Department. The Department agreed to copy that portion of the requested records that Mr. Pilpel wanted copied after he had been given the opportunity to review them. As noted, Mr. Pilpel had already agreed to pay the copying costs. In light of this agreement, the Supervisor of Records found that three issues raised in the petition had become moot: (1) whether the records were public (although it was our understanding that the Department had never taken the position that the records were not public or that they were exempt from disclosure), (2) whether the Department may require Mr. Pilpel to copy the records himself, and (3) whether the Department may require Mr. Pilpel to submit a driver's license in order to inspect the records.

Mr. Pilpel had also alleged that the Department's response to his public records request was not timely and that the Department had not conducted a diligent search for the records. We declined to make a determination on these issues because the role of the Supervisor of Records under the Sunshine Ordinance is limited. The Supervisor of Records is required to determine whether a record that has been requested is public. Accordingly, the Supervisor of Records generally limits the review of petitions to that determination, and does not address in every particular whether a City department is complying with state and local laws governing access to public records.

Finally, Mr. Pilpel asked the Supervisor of Records to issue an order directing the Department to change its policies. But the Sunshine Ordinance does not authorize the Supervisor of Records to issue such an order. Rather, it requires the Supervisor of Records, upon finding that a City department is refusing to produce a record that is public, to order the Department to comply with its duty to produce the record.

3. Petitioner: Kimo Crossman
Department: Ethics Commission
Records sought: Commission Meeting Information
Custodian of Records: Steven Massey
Determination: Denied – records properly withheld
Appendix: Pages 7-8

Mr. Crossman submitted a petition regarding his request to Ethics Commission staff for notes and minutes taken by staff for the Ethics Commission meeting of October 19, 2009. Staff had provided Mr. Crossman with a copy of draft minutes of the meeting and staff notes, but the notes had been redacted under Evidence Code Section 950 *et seq.* (attorney-client communications) and Government Code Section 54963 (prohibiting unauthorized disclosure of the content of confidential closed sessions). Mr. Crossman complained that the redactions were illegal.

The Supervisor of Records reviewed the unredacted version of the notes and determined that the redactions were proper because they related only to closed sessions held for the purposes

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of discussing pending litigation. The closed sessions are authorized under the Brown Act (Government Code §54956.9) and the Sunshine Ordinance (S.F. Admin. Code §67.10(d)).

4. Petitioner: Kimo Crossman
Department: Sunshine Ordinance Task Force
Records sought: Redacted Contact Information
Custodian of Records: Chris Rustom
Determination: Denied – records properly withheld
Appendix: Page 9

Mr. Crossman had asked the Clerk of the Sunshine Ordinance Task Force ("SOTF") to provide unredacted contact information for a complaint filed with the Task Force.

The SOTF complaint form includes a "check-off box" for complainants to indicate whether they wish to have their contact information withheld from public disclosure. The complainant in this matter had checked the box, directing nondisclosure.

The Clerk had redacted that portion of the complainant's email address that identified the individual user and the complainant's street address, but disclosed the complainant's name, the name of the email internet server, and the complainant's city and zip code.

Mr. Crossman's petition asserted that the Clerk had "illegally redacted contact information voluntarily provided by an SOTF Complainant."

The Supervisor of Records determined that the Clerk properly withheld the complainant's contact information based on the right to privacy, which is protected by constitutional and statutory authority. Cal. Const., Art. I. sec. 1; Gov't Code §§6254(k) and 6254(c); and S.F. Admin. Code §67.1(g).

5. Petitioner: Christian Holmer
Department: Sheriff's Office
Records sought: Records Retention and Destruction Schedule
Custodian of Records: Jim Harrigan
Determination: Denied because moot - record provided

Mr. Holmer asked the Sheriff's Office for a copy of its Records Retention and Destruction Schedule. The Sheriff's Office had mailed a copy to Mr. Holmer but Mr. Holmer wished to have the record sent electronically. The Sheriff's Office and the Supervisor of Records agreed that the Supervisor of Records would send Mr. Holmer the link to the index of records on the City's website for the Sheriff's Office. Mr. Holmer indicated that this information satisfied his request.

6. Petitioner: Christian Holmer
Department: Sunshine Ordinance Task Force

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TO: Honorable Members
Sunshine Ordinance Task Force

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RE: Eleventh Annual Report of the Supervisor of Records
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Records sought: Sunshine Related Correspondence

Custodian of
Records: Chris Rustom

Determination: Denied - miscommunication between Clerk and
petitioner

Mr. Holmer sent a request to the Clerk of the Sunshine Ordinance Task Force for "Sunshine Related Correspondence (Which Includes Correspondence With (To/From) Complainants And Correspondence With (To/From) Responsive (Show Up at SOTF Hearings) and Unresponsive (Won't Show Up At SOTF Hearings) City Departments/Agencies and San Francisco City and County Employees and Custodians of Government Correspondence/Public Records."

After Mr. Holmer filed his petition with the Supervisor of Records and the Clerk received a copy of the petition, the Clerk informed the Supervisor of Records and Mr. Holmer that he did not recall receiving the request and he asked that Mr. Holmer submit requests that clearly state what records he is requesting.

We informed Mr. Holmer that in light of Mr. Rustom's message, there appeared to be a miscommunication between the two and if Mr. Rustom did not respond to Mr. Holmer after he clarified the request, Mr. Holmer could refer the matter to the Supervisor of Records. Mr. Holmer did not petition the Supervisor of Records further regarding the request.

7. Petitioner: Ellen Tsang

Department: Department of Building Inspection

Records sought: Building permit application in electronic form

Custodian of
Records: William Strawn

Determination: Denied because the limited role of the Supervisor of
Records does not extend to the issue raised

Appendix: Pages 10-11

Ms. Tsang requested a building permit application in electronic form from the Department of Building Inspection ("Department"). The Department had the record in "hard copy" and had offered to provide it to Ms. Tsang, but Ms. Tsang wanted the electronic version.

We declined to make a determination on the issue raised by Ms. Tsang because of the limited role of the Supervisor of Records under the Sunshine Ordinance. See discussion above for Petition No. 2, on page 4. In this matter, there was no dispute that the record in question was public and that the Department would provide a "hard copy" to Ms. Tsang. The only issue was the Department's duty to provide the record in another format.

Notwithstanding this determination, the Supervisor of Records, in an effort to be of assistance, provided Ms. Tsang with additional information obtained from the Department about its system for maintaining records in non-electronic form, the procedures needed to convert records to electronic form, the burden on the Department if it had to undertake this conversion

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process at the request of a member of the public due to the large volume of records stored by the Department, and the information currently available on the Department's web site.

8. Petitioner: Kimo Crossman

Department: City Attorney's Office

Records sought: Annual report of the Supervisor of Records in Word;
alleged "conflict of interest" to decide withholding of
records by City Attorney's Office

Custodian of
Records: Paula Jesson

Determination: Denied – record properly withheld

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Mr. Crossman asked the City Attorney's Office for the latest annual report of the Supervisor of Records in Word format. The City Attorney's Office offered to provide the record in PDF format, but declined to provide it in Word for the reasons set forth in the opinion of the office dated September 19, 2006 (available on the City Attorney's website). The City Attorney's Office also noted that the record in Word would have metadata that constitutes attorney work product, which is protected from disclosure under California Government Code Section 6254(k) (public agencies not required to disclose records where disclosure is exempted or prohibited by federal or state law) and California Code of Civil Procedure Section 2018.030 (protecting as work product writings that reflect attorney's impressions, conclusions, opinions or legal research or theories).

Thereafter, Mr. Crossman asked the City Attorney's Office to

run the free hidden data removal tool on the native word doc and send it over. While this may remove some metadata which is actually discloseable I am ok with it. (This is a request for that easily generated format.)

The City Attorney's Office declined Mr. Crossman's request, again based on the reasoning in the September 19, 2006 opinion.

Mr. Crossman filed a petition with the Supervisor of Records alleging that the Office was required to provide the document in Word and, in addition, arguing that it would be a "conflict of interest" for the City Attorney's Office to rule on his petition. He suggested that the matter be referred to outside counsel.

With respect to the alleged "conflict of interest," the Supervisor of Records informed Mr. Crossman that the City Attorney's Office may properly respond to his petition, even though the City Attorney's Office is the responding department. The Sunshine Ordinance gives those who have requested a record from a City department the right to appeal the Department's response to the Supervisor of Records. The Sunshine Ordinance defines the Supervisor of Records to mean the City Attorney. S.F. Admin. Code §67.20(c).

Nothing in the Sunshine Ordinance creates a different procedure for petitions seeking review of the City Attorney's Office than for those seeking review of any other department. We presume that the drafters of this provision, and the voters who adopted it, were aware that

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petitions may involve the office designated to serve as Supervisor of Records. In the absence of the Ordinance's creating a separate procedure for requests made to the City Attorney, there is no authority for another City official, or for anyone outside of City government, to assume the role of Supervisor of Records.

The function of the Supervisor of Records is to provide citizens with an inexpensive, simple and relatively fast method of obtain another level of review of – a second look at – a department's response to a public records request. The general practice of the City Attorney's Office, though not legally required, is to assign a deputy in the Office who was not involved in the initial decision on the public records request to review and respond to the petition, no matter what City department received the initial request. This general practice enhances the effectiveness of the "second look" as Supervisor of Records. The general practice applies to requests made to the City Attorney's Office. In this matter, the Office assigned a deputy other than the one who handled the initial public records request to review the matter as Supervisor of Records.

9. Petitioner: Brent Begin
 Department: San Francisco Police Department
 Records sought: Report of Laboratory Accreditation Board
 Custodian of Records: Maureen Conefrey
 Determination: Denied because moot - record provided

Mr. Begin filed a petition with the Supervisor of Records regarding his request to the San Francisco Police Department for a copy of the report of the American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB) required for the Crime Lab's accreditation. The Police Department had denied Mr. Begin's request, informing him that the report "is not intended for public consumption" and is "meant to be a private communication."

While the Supervisor of Records was reviewing the matter, the Police Department provided the report to Mr. Begin.

10. Petitioner: Identity omitted
 Department: Department of Emergency Management
 Records sought: Computer Assisted Dispatch 911 Reports
 Custodian of Records: Annette Goley
 Determination: Denied – records properly withheld
 Appendix: Pages 16-19

The name of the person who requested records in this matter is omitted based on the requester's right to privacy. The requester asked for records of 911 calls in which the requester himself or herself was the subject of the call. People call 911 to report conduct that may be criminal or dangerous, and also that may be highly offensive. Disclosing the name of the subject

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of a 911 call would in many cases stigmatize that person, who often will have no meaningful way to dispel the stigma. In some cases, the stigma is particularly unwarranted because the caller has provided inaccurate or incomplete information, either intentionally or not. In light of these privacy concerns, we have withheld the name of the requester in this matter, where disclosure of the requester's identity would not seem to significantly further the public's interest in monitoring the operations of government.

The requester asked the Department of Emergency Management ("Department") for Computer Assisted Dispatch 911 reports (known as "CAD 911 reports") for incidents on three separate days involving the requester's residence. The requester also asked for "any records [the Department] holds" pertaining to the requester.

CAD 911 reports relate the substance of a 911 call and certain follow-up investigations.

The Department provided transcripts of the CAD 911 reports for the three days specified by the requester, but redacted two types of information: personal information (names, address, and telephone numbers) and information that the Department described as "privileged law enforcement database records." The Department provided no records in response to the request for "any records" of the Department pertaining to the requester, on the grounds that the request was overbroad, that "searches are made using specific date, time and location," and that the request pertained to records "other than [the requester's] own."

The requester filed a petition with the Supervisor of Record, alleging that the Department had improperly withheld the requested records.

Redaction of Callers' Personal Information

The Supervisor of Records determined that the Department properly redacted callers' personal information from CAD 911 reports based on their right to privacy. Calls to 911 often involve reports of either a violent situation or one where there is potential for violence. Callers often report possible violations of law and, in many such cases, request immediate police assistance at the scene, which may lead to the arrest of the person who is the subject of the call. Even if an arrest is not involved, and even if the situation prompting the call does not necessarily raise the possibility of violence, the 911 call often results in intervention by police or other authorities that the subject of the call will naturally resent. If he or she is made aware of the identity of the caller, the safety and security of the caller may be jeopardized.

The Department reasonably concluded that prudence dictates that it redact personal information pertaining to the caller, including the caller's name and contact information. While safety and security concerns are not always presented by disclosure of the caller's identity and contact information, the concerns are substantial enough to warrant the redactions. Calls to 911 may come from a neighbor, or someone in the same apartment building or house, or from one who otherwise is known to the subject. There is no meaningful way for the Department to determine which calls might present safety and security concerns for the caller if the caller's identity and contact information were disclosed, and which might not. A case-by-case evaluation of whether the subject of the call already knows the caller's identity would be prone to error.

In addition, even where there is no safety or security concern in disclosing a caller's personal information, disclosure may result in callers receiving follow-up calls and other

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intrusions by the media or other persons. Though not determinative in this case, this concern also implicates the caller's privacy.

Finally, the Department, which has more expertise than this Office in the operational dimensions of 911 systems, had expressed a practical concern that is an outgrowth of the privacy concerns discussed above. The Department believes that if it makes CAD 911 reports available without redacting the caller's identity and contact information, the 911 system would be undermined. In the Department's expert judgment, some people would choose not to call 911, or would provide less information in a call, if it became known that the identity of the caller and contact information would be released to the public.

Redaction of CLETS Data about the Subject of a 911 Call

The Supervisor of Records determined that a large part of the CAD 911 report that the Department had redacted is "CLETS" data. CLETS – which stands for California Law Enforcement Telecommunications System – is a system created under state law for the retrieval by law enforcement personnel of criminal justice information such as arrests and convictions about a particular person. *See generally* Gov. Code §§ 15150-15167. It is common for police who are responding to a 911 call to run an electronic check of a person's criminal justice history, and that is what happened with respect to the call that resulted in the CAD 911 report in question.

Numerous provisions of law restrict access to CLETS data. *See, e.g.*, Penal Code §§ 11075-11081, 11105, 13200-13203, 13300-13305; Vehicle Code §§ 1808 *et seq.* Gov. Code §6276.12 (expressly incorporating in Public Records Act certain Penal Code provisions prohibiting disclosure of CLETS data); and Evidence Code § 1040(b) (1).

Failure to Provide Other CAD 911 Reports Pertaining To Petitioner

The final request was for "any record [the Department] holds" pertaining to the requester. The Department had informed the requester that this request was overbroad and that searches of CAD 911 transcripts "are made using a specific date, time, and location." According to the Department, it did not have CAD 911 reports indexed in a manner that corresponded to the request and the information in the CAD reports was not retrievable by name of the subject of the 911 call. Further, the Department informed us that a manual review of all CAD 911 transcripts was infeasible because of the large volume of transcripts; there literally were thousands.

The Supervisor of Records determined that the Department acted lawfully in not providing the requested records. The law does not require the Department to conduct a search for records that amounts to looking for "a needle in a haystack." *California First Amendment Coalition v. Superior Court* (1998) 67 Cal.App.4th 159, 166.

Nonetheless, we requested that the Department search the CAD 911 transcripts for records pertaining to requester at the requester's residence address. The Department agreed to do so and thereafter informed us that it had located such transcripts and would provide the requester with the records with appropriate redactions.

11. Petitioner: Ross Wilkinson
Department: Office of the Mayor
Records sought: Records relating to Rent Board appointments

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Custodian of
Records: Joe Arellano
Determination: Denied – no responsive records
Appendix: Pages 20-21

Mr. Wilkinson asked the Office of the Mayor to provide "[a]ll public information transmitted to you and your predecessors advocating that the Mayor appoint any of the following rent board members or from you and/or your predecessors in response to any such advocacy: Polly Marshall, Cathy Mosbrucker, Deborah Henderson, Dave Crow."

The Mayor's Office responded that "[a]ll responsive documents are attached." The two attached documents were notices of appointment of Dave Crow and Cathy Mosbrucker to the Rent Board.

Mr. Wilkinson filed a petition with the Supervisor of Records asking for a determination that the records he sought were public records. The Supervisor of Records noted that the two documents that the Mayor's Office had provided to Mr. Wilkinson were not responsive to the request. They involved the appointment of two members of the Rent Board but they were not in the nature of advocacy documents in support of the appointees or responses to advocacy documents. The Supervisor of Records discussed this concern with Mr. Arellano, who indicated that the Mayor's Office had done a search for relevant files but had found no advocacy documents or responses to advocacy documents pertaining to the four persons identified in the request.

In light of Mr. Arellano's representation that the Mayor's office had no responsive records, the Supervisor of Records informed Mr. Wilkinson that this office would close its file on the matter when it received written confirmation in the form of a letter to Mr. Wilkinson that the Mayor's Office had no responsive records. Mr. Arellano thereafter sent Mr. Wilkinson the confirming letter.

12. Petitioner: Kimo Crossman
Department: Clerk of the Board of Supervisors
Records sought: Redacted records relating to Sunshine Ordinance Task Force appointments
Custodian of
Records: Angela Calvillo
Determination: Denied – redactions were lawful
Appendix: Pages 22-23

Mr. Crossman asked the Clerk of the Board of Supervisors for copies of applications for appointment to open seats on the Sunshine Ordinance Task Force. The Clerk provided Mr. Crossman with copies of the applications but redacted some personal information, including the applicants' personal email addresses. Mr. Crossman sought copies of the records without the redaction of personal email addresses, which the Clerk declined to provide.

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Mr. Crossman filed a petition with the Supervisor of Record, seeking unredacted records. The Supervisor of Records denied the petition, finding the redactions necessary to protect the applicants' right to privacy.

13. Petitioner: Kimo Crossman

Department: Office of the Mayor

Records sought: Various records, including calendars

Custodian of Records: Lily Madjus

Determination: Denied – records properly withheld or redacted; for some requests, the Office properly responded that it had no responsive records; for some requests, denied as to issues that extend beyond the limited role of the Supervisor of Records

Appendix: Pages 24-29

Mayor's Prop G Calendar

Mr. Crossman requested that the Mayor's Office provide the Mayor's "Prop G calendar" for the previous two business days. The San Francisco Sunshine Ordinance requires the Mayor and certain other public officials to maintain a calendar, commonly referred to as a "Prop G calendar," that meets the requirements of San Francisco Administrative Code Section 67.29-5. After reviewing the calendar, Mr. Crossman concluded that it was legally inadequate and filed a petition with the Supervisor of Records.

In his petition and in communications with the Mayor's Office, Mr. Crossman stated that he had "not received the fully detailed Prop G calendar for the Mayor" and "[t]he mayor's calendar of meetings in city hall is seriously lacking in detail as required by Prop G. This includes meetings outside city hall as well" and "[a]re you and [Mayor's Office of Communications] asserting that the Mayor met (including phone calls) with no person in City Hall and no one outside City Hall who is substantially financially affected by actions of the city during the calendar days I requested?"

The Mayor's Office informed the Supervisor of Records that it would send Mr. Crossman a revised Prop G calendar for July 8 through 12, that the Prop G calendar would show no meetings or events for the Mayor for July 8 through 11, and that during those four days the Mayor had no meetings or events as defined in Section 67.29-5 of the Sunshine Ordinance.

In light of this additional response on the matter, the Supervisor of Records found Mr. Crossman's petition moot. But Mr. Crossman continued to raise concerns about the Mayor's compliance with the Prop G calendar requirements. He described certain types of communication (phone calls, text messages, etc.) and times (outside business hours) and locations/attendees (meetings outside City Hall with people affected by City actions) that he did not find on the revised calendar. He asserted that such matters should have been included and that their absence made them legally insufficient. Mr. Crossman found additional evidence of legal insufficiency in the absence of calendar entries for the Mayor for several days.

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In a related comment, Mr. Crossman stated: "It is the responsibility as part of the Appeal for Supervisor of Records to examine all the relevant records and to demand their production. Instead you have just indicated that the records were forthcoming and did not examine their completeness and lawfulness."

In response, we first addressed the role of the Supervisor of Records in ensuring that a department's response is complete. We informed Mr. Crossman that in determining whether a record that has been requested is public, the Supervisor of Records necessarily relies on City departments to search their files for responsive records and to provide the records to this office so that it can conduct the necessary review; that in our experience, departments typically understand their legal obligation to conscientiously search their files for responsive records, but if there is any apparent need to remind a department of this requirement, we do so; and that if Mr. Crossman had any reason to believe that the Mayor's Office had not undertaken an adequate search or otherwise had not produced all responsive records, he should address those concerns to that Office.

With respect to Mr. Crossman's assertion that the Mayor's calendar did not comply with the requirements of Section 67.29-5 of the Sunshine Ordinance, the Supervisor of Records did not decide the issue because of the limited role of the Supervisor of Records, as discussed above for Petition No. 2, on page 4.

Mayor's "Working" Calendar

Mr. Crossman asked the Supervisor of Records to determine that the Mayor is required to produce his "working calendar" with "appropriate security redactions." Mr. Crossman asserted that this record "is discloseable under [the California Public Records Act] and must be preserved under [Section 67.29-7] of the Sunshine Ordinance."

The Supervisor of Records disagreed with Mr. Crossman's position. The Mayor's "working calendar" contains private information about personal activities not required to be disclosed under San Francisco Administrative Code Section 67.29-5, private phone numbers and addresses of others, the identity of constituents who meet with the Mayor to petition their elected representative, the identity of whistleblowers or other persons who complain about violations of law, and information acquired in confidence from others. The Mayor's "working calendar" also contains security details that the Police Department uses as a security file to plan and execute security staffing and strategy.

This information is protected from disclosure under California Constitution Article I, section 1 (privacy) and Article I, section 3 (right to petition elected representatives); Government Code Sections 6250 and 6254(c) (privacy); San Francisco Administrative Code Section 67.1(g) (privacy); Evidence Code Sections 1040 (official information privilege) and 1041 (identity of informant privilege). The California Supreme Court recognized the right to withhold security information relating to a high-level government official in *Times Mirror Company v. Superior Court*, 53 Cal.3d 1325 (1991) (Governor not required to release his daily calendar). The *Times Mirror* Court based its decision on Government Code Section 6255, but Government Code Section 6254(f) also applies. That Section allows a public agency to deny access to "security procedures" and "security files."

The Supervisor of Records determined that by providing a calendar that meets the requirements of San Francisco Administrative Code Section 67.29-5, the Mayor had provided the

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equivalent of his "working calendar" properly redacted and that disclosure of the Prop G calendar met the requirements of the Public Records Act and the Sunshine Ordinance.

Steve Kawa's Calendar

Mr. Crossman requested that the Mayor's Office provide "the two business days prior Prop G calendar" for an employee, Steve Kawa.

The Sunshine Ordinance requires that the Mayor, City Attorney and department heads maintain a calendar. S.F. Admin. Code §67.29-5. Mr. Kawa is not one of the officials or employees required to comply with this requirement. But Mr. Kawa had in fact kept a calendar for the period requested by Mr. Crossman. The Mayor's Office provided Mr. Kawa's calendar to Mr. Crossman, but with one item redacted. The word "Personal" was written next to the redaction. In his petition to the Supervisor of Records, Mr. Crossman alleged that the redaction was illegal.

The Mayor's Office informed the Supervisor of Records that the item redacted involved a matter that was personal to Mr. Kawa and unrelated to City business. The Supervisor of Records determined that the redaction was lawful based on the employee's right to privacy.

Tony Winnicker's Calendar

Mr. Crossman requested "the two business days prior Prop G calendar" for Tony Winnicker, an employee of the Mayor's Office. The Mayor's Office had informed Mr. Crossman that it had no responsive documents.

Mr. Crossman filed a petition with the Supervisor of Records, expressing concern that Mr. Winnicker had responsive records that were not being provided. We discussed the issue with Mr. Winnicker, who told us that the response was accurate and that he did not maintain a calendar. Accordingly, the Supervisor of Records found that the Mayor's Office had responded properly to Mr. Crossman's request.

In the response, we also informed Mr. Crossman that, contrary to his reference to Mr. Winnicker's "Prop G calendar," Mr. Winnicker is not subject to the calendar requirement in the Sunshine Ordinance because that requirement applies only to the Mayor, City Attorney and department heads.

Request for Email Messages from the Press

Mr. Crossman requested all public records sent to the San Francisco Examiner on the day of the request, including "any emails from the Mayor's Communications staff including private accounts." The Mayor's Office provided Mr. Crossman with records, but Mr. Crossman found the response inadequate. In his petition to the Supervisor of Records, Mr. Crossman stated: "There is only one provided written response from Mr. Winnicker to many emails from the press – Were these never responded to in any written manner with any device – Prop 59 covers writings of officials and is not limited to government owned devices."

The Supervisor of Records informed Mr. Crossman that Mr. Winnicker had confirmed that he had no additional responsive records. Accordingly, the Supervisor of Records denied this portion of the petition.

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Deleted Records

With respect to the various requests for records discussed above, Mr. Crossman asked the Mayor's Office to provide a description and count of any records that had existed that were subject to his request but had since been deleted, and to retrieve them from archived records. The Supervisor of Records declined to address this issue because of the limited role of the Supervisor of Records, as discussed above (Petition No. 2, page 4), but noted that the Mayor's Office had informed us that it had no deleted records to report in responding to the request.

14. Petitioner: Edward Campbell

Department: San Francisco Fire Department

Records sought: Time-off and time called-in sick records and disciplinary records, including race and gender information

Custodian of Records: Rhab Boughn

Determination: Denied – records properly withheld or redacted and Department provided additional records without protected personal information

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Mr. Campbell asked the San Francisco Fire Department ("Department") for the following records:

1. A listing of all uniformed members by rank, who requested time-coming (TC) days off, including the race and gender of the member, the date they requested usage and the resulting decision, i.e., granted or not granted, during the time period of September 1, 2008 through June 30, 2010
2. A listing of all uniformed members who called in sick during the time period of September 1, 2008 through June 30, 2010
3. A listing of all disciplinary actions taken against all members of the San Francisco Fire Department, including the race and gender of the member, specific charges and the resulting disciplinary action administered during the time period of September 1, 2008 through June 30, 2010

"Time-coming" ("TC") means time that employees of the Department have accrued for overtime work. An employee who wishes a paid day off may request to use accrued TC.

For positions that need to be back-filled when the employee is absent from work, the Department limits the number of slots available each day for approved TC. When the Department denies a TC request because of this limitation, it refers to the "quota" being "filled."

The Department's Response

1. The Department provided TC records for January 1, 2010 to July 9, 2010, but not for earlier years because it deletes prior years' records. The Department provided the requested information in the form of a chart, with employees listed only by rank, not by name. The

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Department did not provide race and gender information based on the employees' right to privacy.

2. The Department declined to provide records of the uniformed members who called in sick during the specified time period based on the employees' right to privacy.

3. The Department provided records of disciplinary actions taken against uniformed members of the Department for July 1, 2008 through June 30, 2010 in the form of a chart. The chart listed the name of the employee disciplined, the employee's rank, the date of the incident giving rise to the discipline, the charges by reference to the rule violated, the discipline recommended, and the discipline imposed. But the Department redacted most of the entries on the chart on the ground that they constituted personnel information and were therefore exempt from disclosure based on the employees' right to privacy.

Determination

Mr. Campbell filed a petition with the Supervisor of Records, seeking a determination that the Department was required to provide all of the records that he had requested.

Mr. Campbell's petition required consideration of two principles that, in the context of public records requests, are often in tension with one another. The first principle is the right of privacy, recognized by the California Constitution (Article I, §1), the California Public Records Act (Gov. Code §6254(c)), and the San Francisco Sunshine Ordinance (S.F. Admin. Code §67.1). The second principle is the public's strong interest in monitoring government operations. S.F. Admin. Code §67.1; Gov. Code § 6250.

When considering requests for public records, public agencies must balance the privacy interests of affected individuals against the public's interest in monitoring government. See *Trentadue v. Integrity Committee* (C.A.10 2007), 501 F.3d 1215, 1233 (court must consider whether release of private information in response to public records request under the federal Freedom of Information Act would "shed light" on the government's performance of the prevailing wage laws). In weighing the public interest in disclosure, public agencies must consider the extent to which the disclosure of the information will shed light on how the local agency conducts the public's business. *Commission on Peace Officers Standards and Training v. Superior Court*, 42 C.4th 278, 299 (2007).

The *Good Government Guide* issued by the City Attorney's Office provides an overview of the right to privacy in the context of personnel records, including the following excerpts (at p. 75, 2007-08 edition):

In some circumstances, there is an absolute statutory bar to disclosure of information based on the privacy interests of individuals In many circumstances, the bar to disclosure is not absolute, but is still high; there must be a strong justification before a department may release a record that compromises an individual's privacy. In either event, a City department may not disclose a record where disclosure would violate the right to privacy protected by federal or state law.

The department may decline to disclose personnel, medical or similar files, "the disclosure of which would constitute an unwarranted invasion of personal privacy." Gov. Code § 6254(c). But all personnel records are not automatically exempt. For example, members of the public are entitled to see records that contain an employee's name, job

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classification, current assignment, and actual wages earned including overtime. The City must also disclose the amount, basis or recipient of any performance-based increase in compensation, benefits or bonus awarded to any employee. Admin. Code § 67.24(c).

* * *

Because of the right to privacy, the City may not disclose such personal information as the employee's home address, telephone numbers, personal email address, social security number, age, date of birth, ethnicity and marital status.

To the extent permitted by law, the Sunshine Ordinance requires the City to disclose records of an employee's confirmed misconduct. Admin. Code § 67.24(c)(7).

Records containing medical information about an employee pose special privacy concerns

San Francisco Administrative Code Section 67.24(c)(7), referenced in the material just quoted, provides that confirmed misconduct of City employees is not exempt from disclosure when it falls within the following categories: personal dishonesty; misappropriation of public funds, resources or benefits; unlawful discrimination against another on the basis of status; abuse of authority; and violence.

1. Time-Coming (TC) Information

Withholding of the Names of Employees Who Requested TC

The Supervisor of Records first considered the Department's withholding of the names of employees who requested TC. Arguably, TC records contain no sensitive personal information. An employee who has accrued TC may request it for illness or for any other reason, so the request does not disclose anything about an employee's health or medical condition. Therefore, the Department's release of the names of TC requesters would not, by itself, appear to impinge on the privacy interests of the requesters.

But the Department has a legitimate concern that the disclosure of personally identifiable time-off information, including TC records, could result in a disclosure of sensitive personal information. Such a result could occur if the Department were to disclose personally identifiable records showing the total time off taken by an employee for any reason for a specified time period and the total time-off taken for reasons other than illness or medical condition. By subtracting the time taken off for non-health purposes from the total time taken off, one can quickly figure out the amount of time off that the employee took because of illness.

To make public the dates or amount of time that an employee takes for medical reasons discloses highly personal information about the employee. Where the time taken off for illness is small, the invasion may be minor but still exists. Where the time taken off is great, this information could reveal a significant health problem.

Disclosure of time-off information for identified employees, including sick pay records, would enable the public to monitor governmental operations. The public has a strong interest in knowing whether there is any corruption, inefficiency, prejudice, or favoritism in the administration of a public agency, including its administration of employee time-off programs.

The Supervisor of Records discussed with the Department whether it could provide Mr. Campbell with TC records with employee rank, but without names. The Department said that it

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could, and would, do so. Such records would enable the public to monitor the Department's administration of its time-off practices without impinging on the employees' privacy interests. In light of the Department's willingness to provide the additional TC records, the Supervisor of Records determined that the Department properly withheld employee names from the TC records based on employees' right to privacy.

Moreover, the additional records provided by the Department would include additional information: the specific dates for which employees requested TC (information not included in the records initially given to Mr. Campbell) and the race and gender of each requester (which would not impinge on employees' right to privacy because not linked to identified individuals).

Finally, the Supervisor of Records noted that in compiling TC records in this format, the Department might need to withhold information on employees' rank where this information, when combined with other publicly available information, could disclose the identity of individuals.

Withholding of Race and Gender Information

Mr. Campbell asked for the race and gender of each employee who requested TC, as well as for those employees who called in sick and were disciplined. The Department withheld the race and gender in response to all categories of the request.

It is the choice of Department employees whether to provide their own race and gender information, as well as how to describe their race and gender. Employees have a right to privacy in any race and gender information that they choose to provide. With respect to race, the excerpt from the *Good Government Guide* quoted above recognizes that ethnicity (information closely tied to race) is one of several types of personal information that City departments may not disclose. Gender also constitutes personal information the disclosure of which may impinge on the right to privacy. While many employees may not consider gender information sensitive, some will, including those who do not identify with the gender that a government institution has assigned to them or who are in the process of a medical procedure to change their gender. Nor is it clear that the public interest in monitoring the improper use of time-off is advanced by knowing the race and gender of individual employees. For these reasons, and in light of the Department's willingness to provide the additional records without identifying names as described in the previous section, the Supervisor of Records determined that the Department properly withheld race and gender information.

2. Records of uniformed members who called in sick

Mr. Campbell requested a listing of uniformed members who called in sick between September 1, 2008 and June 30, 2010. The Department did not disclose records in response to the request based on the employees' right to privacy.

Records of requests for sick pay contain information about employees' health or medical condition that is highly personal. While disclosure of the information would allow the public to monitor the Department's administration of its sick pay program, the Supervisor of Records determined that the Department properly concluded that the employees' privacy interests in having the records withheld from disclosure outweighed those of the public in disclosure.

But the Department was able, and willing, to provide sick pay records without employee names, as described above for the additional TC records. In light of the Department's

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willingness to provide the additional records, the Supervisor of Records determined that the Department properly responded to the request.

3. Records of disciplinary actions

Mr. Campbell requested records of disciplinary actions taken against Department employees for September 1, 2008 to June 30, 2010. The Department disclosed a chart that provided disciplinary information for some matters but withheld, through redaction, a large number of entries on the chart. Mr. Campbell argued that the Department had improperly withheld the redacted entries.

In addressing the privacy interests of employees who have been disciplined, the Supervisor of Records noted that disciplinary records are part of an employee's personnel file. Public employees have a legally protected interest in their personnel files. *BRV, Inc. v. Superior Court*, 143 C.A.4th 742, 756 (2006). Disclosure of the information may constitute a violation of the employee's right to privacy. *Payton v. City of Santa Clara*, 132 C.A.3d 152 (1982) (terminated employee allowed to proceed with lawsuit against city for damages suffered when the city posted information about his termination in area accessible to staff). The courts have recognized that the public's right to disciplinary records outweighs an employee's privacy rights in some circumstances. See, for example, *BRV, Inc., supra*, 143 C.A.4th at 757-759 (finding disclosure of personnel records warranted where high-level public official, a school superintendent, had been investigated by school board because of public allegations of wrongdoing and school board thereafter agreed to buy out the official's employment agreement).

Moreover, the Sunshine Ordinance recognizes the necessity of balancing the employee's privacy interest in disciplinary actions and the public interest in monitoring government operations. As noted above, Section 67.24(c)(7) of the Sunshine Ordinance lists categories of wrongdoing that warrant disclosure in cases of confirmed misconduct: personal dishonesty; misappropriation of public funds, resources or benefits; unlawful discrimination against another on the basis of status; abuse of authority; and violence.

After reviewing the matters redacted, the Supervisor of Records determined that the Department properly withheld employee disciplinary records because the employees' right to privacy outweighed the public interest in monitoring government operations. In fact, a number of the entries redacted on the chart were not cases of confirmed misconduct, but investigations that resulted in a finding that the charge was without merit or was not sustained.

P.J.

APPENDIX
TO
ELEVENTH ANNUAL REPORT OF THE SUPERVISOR OF RECORDS
OCTOBER 1, 2009 – SEPTEMBER 30, 2010

RECEIVED
BOARD OF SUPERVISORS
SAN FRANCISCO
2011 APR -5 AM 9:57
BY LB

Paula Jesson/CTYATT
11/02/2009 04:02 PM

To kimo@webnetic.net
cc
bcc
Subject Re: APPEAL Supervisor of Records

Dear Mr. Crossman,

You filed a petition with the Supervisor of Records on October 22, 2009, at 10:22 PM, relating to a public records request that you submitted to the Ethics Commission.

The Supervisor of Records understands from your message and from information provided by Ethics Commission staff that your request was for "all records in the office related to Sunshine complaints that I have filed at SOTF [Sunshine Ordinance Task Force] and have been subsequently referred to the Ethics Commission." I further understand that you informed Ethics Commission staff that you were "interested in the investigator and ethics records rather than the SOTF documents submitted."

Finally, I understand that the records that you seek are currently the subject of a lawsuit filed against the San Francisco Ethics Commission brought under the California Public Records Act and the San Francisco Sunshine Ordinance (*Grossman v. San Francisco Ethics Commission et al.*, Case No. CPF-09-509868, San Francisco Superior Court).

The Supervisor of Records is not responding to your petition at this time. When the Supervisor of Records receives a petition regarding a request for records that is also the subject of pending litigation and the litigation may resolve whether the City is required to disclose the records, the Supervisor of Records will decline to make a determination until the conclusion of the litigation.

When the pending litigation is concluded, the Supervisor of Records will review this matter in light of the holding of the court and any actions that the Ethics Commission takes in light of the court's decision.

Paula Jesson
Deputy City Attorney
City and County of San Francisco
Room 325 City Hall
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102-4682
Telephone: (415) 554-6762
Fax: (415) 554-4699
email: paula.jesson@sfgov.org

Kimo Crossman Even after I offered to review the single set of re...

10/22/2009 10:22:00 PM



Kimo Crossman
<kimo@webnetic.net>
Sent by:
kimocrossman@gmail.com

To Paula Jesson <Paula.Jesson@sfgov.org>, SF City Attorney
Supervisor of Records Adine Varah
<Adine.Varah@sfgov.org>

cc

10/22/2009 10:22 PM

Please respond to
kimo@webnetic.net

Subject APPEAL Supervisor of Records

Even after I offered to review the single set of records already collected - none have been provided nor has any set of legal exemptions been provided to justify withholding of these

Paula Jesson/CTYATT
11/03/2009 01:55 PM

To kimo@webnetic.net
cc
bcc
Subject Re: APPEAL Supervisor of Records

Dear Mr. Crossman,

As you know, Mr. Grossman has sued the City in an effort to gain access under State and local public records laws to certain Ethics Commission records. Your petition to the Supervisor of Records concerns your request for the same records.

The Charter gives the City Attorney the responsibility for defending the City in litigation. S.F. Charter § 6.102. The Sunshine Ordinance recognizes and reaffirms this duty: "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." S.F. Admin. Code § 67.21(j).

The Sunshine Ordinance provides the administrative review procedure set forth in Section 67.21(d), the petition to the Supervisor of Records, to make available to citizens an expeditious and inexpensive method, short of litigation, to obtain review of a City department's response to a public records request. All laws must be construed to further the intent of those who adopted them. The most reasonable construction of the Sunshine Ordinance is that neither the drafters, nor the voters who adopted it, intended to require the City Attorney's Office to issue a determination as Supervisor of Records while simultaneously representing the City on the same issue in court.

Moreover, until Mr. Grossman's suit is resolved, we must assume that the court will or may resolve the same issues as are presented by your petition to the Supervisor of Records. A determination by the Supervisor of Records is not a court decision. A court has the final say as to what the law means. Again, it is unlikely that the Sunshine Ordinance was intended to require the City Attorney's Office to use its resources to issue an administrative determination when a lawsuit has been filed on the same issue and a court may render a final, and conclusive, decision on the matter.

Paula Jesson
Deputy City Attorney
City and County of San Francisco
Room 325 City Hall
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102-4682
Telephone: (415) 554-6762
Fax: (415) 554-4699
email: paula.jesson@sfgov.org

Kimo Crossman Ms. Jesson Please be aware I am not a party in...

11/02/2009 04:17:05 PM



Kimo Crossman
<kimo@webnetic.net>

To Paula Jesson <Paula.Jesson@sfgov.org>



Sent by:
kimcrossman@gmail.com

cc

Subject Re: APPEAL Supervisor of Records

11/02/2009 04:17 PM

Please respond to
kimc@webnetic.net

Ms. Jesson

Please be aware I am not a party in any fashion the the lawsuit you mention.

Also that I agreed to narrow my request to one of the enforcement referrals to ethics they had already retrieved.

Also please note that you are required to direct Ethics to produce the records, validate their legal withholding or refer the illegal withholding after five days to relevant enforcement authorities.

It does not appear to me that you have the ability under Sunshine to decline to rule within seven days as required under Sunshine based on a pending legal dispute with another party. If I am wrong, please point me to language that allows you to withhold providing a ruling.

Therefore please rule on the discloseability of the withheld records and the validity of the ethics commission's exemptions.

On Mon, Nov 2, 2009 at 4:02 PM, Paula Jesson <Paula.Jesson@sfgov.org> wrote:

Dear Mr. Crossman,

You filed a petition with the Supervisor of Records on October 22, 2009, at 10:22 PM, relating to a public records request that you submitted to the Ethics Commission.

The Supervisor of Records understands from your message and from information provided by Ethics Commission staff that your request was for "all records in the office related to Sunshine complaints that I have filed at SOTF [Sunshine Ordinance Task Force] and have been subsequently referred to the Ethics Commission." I further understand that you informed Ethics Commission staff that you were "interested in the investigator and ethics records rather than the SOTF documents submitted."

Finally, I understand that the records that you seek are currently the subject of a lawsuit filed against the San Francisco Ethics Commission brought under the California Public Records Act and the San Francisco Sunshine Ordinance (Grossman v. San Francisco Ethics Commission et al., Case No. CPF-09-509868, San Francisco Superior Court).

The Supervisor of Records is not responding to your petition at this time. When the Supervisor of Records receives a petition regarding a request for records that is also the subject of pending litigation and the litigation may resolve whether the City is required to disclose the records, the Supervisor of Records will decline to make a determination until the

CITY AND COUNTY OF SAN FRANCISCO

OFFICE OF THE CITY ATTORNEY



DENNIS J. HERRERA
City Attorney

PAULA JESSON
Deputy City Attorney

DIRECT DIAL: (415) 554-4762
E-MAIL: paula.jesson@sfgov.org

November 5, 2009

Monio Pilpel

San Francisco CA

Re: Petition to Supervisor of Records – San Francisco Planning Department

Dear Mr. Pilpel:

By letter dated October 26, 2009, received on October 27, 2009, you asked the Supervisor of Records to review the response by the San Francisco Planning Department ("Department") to your request for various categories of records: applications for and temporary permits issued to certain parties; applications for and temporary permits issued for property located at Sloat Boulevard and 19th Avenue; and summary logs, case files, and other records relating to those matters.

In your petition, you state that the Department was unable to locate responsive records in its initial search effort and only did so after you identified staff members who had worked on matters related to your request; that the Department failed to locate records in a timely manner; that after you visited the Department upon being notified by phone that the Department had records ready for your review, you were informed that Department staff would not allow you to inspect the records unless you submitted your driver's license to be held by the Department while you conducted the review; that you wanted a copy of the records (other than photographs) but staff would not make the copies for you, requiring instead that you make the copies on copy machines made available at the Department; and that the Department would require payment of ten cents a page for the copies that you made.

You told Department staff, and thereafter put your position in writing, that you were willing to pay the copying costs, but not to do the copying.

Your petition asks the Supervisor of Records "to determine that (1) the records in question are public records, (2) the department is required to furnish [you] copies of the records upon [your] payment of ten cents per page, and further, to the extent that it is within [the Supervisor of Records'] power, to determine that (3) the department failed to timely reply to [your] request, (4) the department failed to conduct a diligent search for responsive records, (5) the department may not ask for and hold a requester's driver's license as a condition of inspecting public records, and (6) the department shall comply with [your] request and revise its policies."

The Supervisor of Records has discussed your petition with staff of the Department. The Department has informed the Supervisor of Records that it will make copies of the requested records for you; that you will have the opportunity to review the materials and identify which portions you want copied (in light of your indication that you did not want copies of materials that you submitted); and that once you have identified which records are to be copied and the copying is done, Brian Smith will contact you to let you know the charge for copying costs and when the materials will be available for pick-up.

CITY HALL • 1 DR. CARLTON B. GOODLETT PLACE, ROOM 234 • SAN FRANCISCO, CALIFORNIA 94102
RECEPTION: (415) 554-4700 FACSIMILE: (415) 554-4699

n:\g\govem\pjesson\supervisorofrecords\mpilpel.doc

Letter to Monio Pilpel

Page 2

November 5, 2009

Because the Department is complying with your request, three of the issues raised in your petition are moot: whether the records are public¹, whether the Department may require you to submit a driver's license in order to inspect the records, and whether the Department's procedures in response to requests for copies violate state or local public records laws. Therefore, this response will not make a determination on these issues.²

Before turning to the remaining three issues, we consider the role of the Supervisor of Records under the San Francisco Sunshine Ordinance. San Francisco Administrative Code section 67.21(d) provides as follows:

(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. [Emphasis added.]

The first sentence of Section 67.21(d) refers to subsection (b), which provides as follows:

(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

¹ It is the understanding of the Supervisor of Records that the Department has never taken the position that the records are not public or are exempt from disclosure.

² Two points should be noted. First, this response does not consider or decide whether the role of the Supervisor of Records includes determining whether a department may require requesters to make copies of records if the department provides requesters with a readily accessible means of copying them.

Second, although this response does not determine whether the Department may require a requester to provide a driver's license before allowing the inspection of records, the Supervisor of Records notes that when questioned about the requirement, the Department provided the following information: that any member of the public can review records at the Department's front desk without submitting identification; that the Department requires identification only when the person requesting records takes them from the front desk into the copy room; that the identification procedure is to ensure that the person remembers to return the record to the front desk and to allow staff to check that the complete record is returned prior to the person's leaving the Department; and that the Department accepts items other than a driver's license or other identification so long as the item is something that will trigger the person to return the record to the front desk. Because this issue has become moot, this response does not address or reach any conclusion as to the facts pertaining to this issue or any possible inconsistency between the information provided by the Department and that provided in your petition.

Letter to Monio Pilpel
Page 3
November 5, 2009

days following receipt of a request, that the record in question is exempt under express provisions of this ordinance.

The underlined portions of subsection (d) focus on the duty of the Supervisor of Records to determine whether a requested record "is public." Accordingly, the Supervisor of Records generally limits her review of a petition to making that determination, and does not address in every particular whether a City department is complying with state and local laws governing access to public records. Having reviewed the three remaining issues that you raise, the Supervisor of Records determines for the following reasons that they do not fall within this limited scope of review.

First, the petition states that the Department's response to your request was not timely. The Supervisor of Records does not consider whether a City department has violated the response time requirements of the public record laws at some point in the past, but only whether a department has located responsive records and has a duty to produce them but has not done so.


Second, the petition states that the Department failed to conduct a diligent search for the records. Subsection 67.21(d) assumes that the department has located responsive records but declined to produce the records to the requester. The Supervisor of Records is then responsible for determining whether the Department may lawfully withhold the records, or whether they must be disclosed. The Supervisor of Records does not determine whether a department has conducted a sufficiently diligent search under the law.³

Finally, the petition asks the Supervisor of Records to determine that the Department is required to comply with your requests and to revise its policies. But for the reasons noted, the Supervisor of Records is issuing no order to the Department. In any event, the Sunshine Ordinance does not authorize the Supervisor of Records to order a City department to revise its policies, but rather it requires the Supervisor of Records, upon finding that a City department is refusing to produce a record that is public, to order the Department to comply with its duty to produce the record.

The Department has asked the Supervisor of Records to let you know that you can contact Brian Smith at 575-6835 for further information on obtaining the copies that you requested.

Very truly yours,

DENNIS J. HERRERA
City Attorney


Paula Jesson
Deputy City Attorney

cc: Brian Smith
San Francisco Planning Department

³ The issue of whether a department has undertaken a diligent search is different from that of a department's undertaking no search. The Supervisor of Records reserves the authority to address the latter situation, should it arise.

Paula Jesson/CTYATT
11/20/2009 02:55 PM

To kimo@webnetic.net
cc kimocrossman@gmail.com, Steven Massey
<Steven.Massey@sfgov.org>
bcc
Subject Re: APPEAL: Immediate disclosure request - notes from
Ethics meeting on 10/19

I see. Thanks.

Paula Jesson
Deputy City Attorney
City and County of San Francisco
Room 325 City Hall
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102-4682
Telephone: (415) 554-6762
Fax: (415) 554-4699
email: paula.jesson@sfgov.org

Kimo Crossman Thank you if they had indicated they were minut...

11/20/2009 02:54:36 PM



Kimo Crossman
<kimo@webnetic.net>
Sent by:
kimocrossman@gmail.com

11/20/2009 02:53 PM

Please respond to
kimo@webnetic.net

To Paula Jesson <Paula.Jesson@sfgov.org>
cc Steven Massey <Steven.Massey@sfgov.org>
Subject Re: APPEAL: Immediate disclosure request - notes from
Ethics meeting on 10/19

Thank you if they had indicated they were minutes from the closed session, I would not have appealed.

On Fri, Nov 20, 2009 at 2:44 PM, Paula Jesson <Paula.Jesson@sfgov.org> wrote:

Dear Mr. Crossman,

On November 3, 2009, you submitted a petition to the Supervisor of Records regarding your public records request to Ethics Commission staff for "any notes/minutes taken by staff as part of the Ethics Commission meeting on 10/19."

On October 22, a member of the Ethics Commission staff, Steven Massey, responded. He informed you that the draft minutes of the October 19 meeting were not yet ready and would be provided to you when they were. Also on October 22, you responded, saying that you were "asking for any notes taken at the meeting," including those "typed by staff or handwritten by staff."

On October 30, Mr. Massey sent you a copy of the draft minutes of the October 19 meeting. The same day you replied: "Thanks but I also want any handwritten or typed notes taken actually at the meeting."

In your November 3 petition, you said that the notes had not been provided to you.

On November 3, Mr. Massey sent you notes from the meeting, as you had requested. Mr. Massey's message informed you that the document had been redacted under Evidence Code Section 950 et seq. (attorney-client communications) and Government Code Section 54963 (reflecting the content of confidential closed sessions).

You submitted a second petition to the Supervisor of Records on November 10, stating that the Ethics Commission staff had "illegally redacted materials."

The Supervisor of Records has reviewed the unredacted version of the notes provided to you and has determined that the notes that staff redacted related only to the closed sessions, and the closed sessions were held under the rubric of pending litigation. Therefore, they were properly redacted under the State laws cited in Mr. Massey's message on November 3.

Paula Jesson
Deputy City Attorney
City and County of San Francisco
Room 325 City Hall
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102-4682
Telephone: (415) 554-6762
Fax: (415) 554-4699
email: paula.jesson@sfgov.org

Kimo Crossman
<kimo@webnetic.net>

>

To

Sent by: Paula Jesson
kimocrossman@gmail.com <Paula.Jesson@sfgov.org>
cc

Subject

11/03/2009 02:39

APPEAL: Immediate disclosure

Paula Jesson/CTYATT
11/20/2009 02:46 PM

To kimo@webnetic.net
cc Chris Rustom/BOS/SFGOV@SFGOV
bcc
Subject Re: APPEAL: Immediate Disclosure Request contact information #09051i_3

Dear Mr. Crossman,

On November 12, 2009, you submitted a petition to the Supervisor of Records regarding your request for "unredacted contact information" for a person who filed a complaint with the Sunshine Ordinance Task Force ("SOTF"). Your petition complains of the "illegally redacted contact information voluntarily provided by an SOTF Complainant."

The SOTF complaint form includes a "check-off box" where complainants can indicate if they wish to have their contact information withheld from public disclosure. The person whose complaint you requested had checked this box.

The clerk for the SOTF, Chris Rustom, redacted from the copy of the complaint that he provided to you that portion of the email address that identifies the individual user, but not the name of the internet server. Mr. Rustom also redacted the complainant's street address, but not city and zip code. The complainant's name was not withheld.

The complainant's home and personal email addresses may be withheld from public disclosure based on the right to privacy, which is protected by constitutional and statutory authority. California Constitution, Article I, section 1; California Government Code Section 6254(k); California Government Code Section 6254(c); and S.F. Administrative Code Section 67.1(g).

This office issued an opinion advising that City departments may withhold personal email addresses based on the right to privacy. If you do not have a copy of that opinion (addressed to the SOTF and dated May 15, 2007), the Supervisor of Records can provide a copy to you.

See also the following decisions issued since the May 15, 2007 opinion, both decided under the federal Freedom of Information Act and finding the disclosure of personal email addresses an unwarranted invasion of personal privacy. *Nulankeyutmonen Nkihtaqmikon v. Bureau of Indian Affairs*, 493 F.Supp.2d 91, 108 (D.Me. 2007); *Center For Public Integrity v. F.C.C.*, 505 F.Supp.2d 106, 114 (D.D.C. 2007).

In this case, while the complainant clearly has a privacy interest in her home and personal email addresses, we can discern no public interest in disclosing this information. Disclosure would not shed light on the conduct of the public's business.

For these reasons, your petition is denied.

Paula Jesson
Deputy City Attorney
City and County of San Francisco
Room 325 City Hall
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102-4682
Telephone: (415) 554-6762
Fax: (415) 554-4699
email: paula.jesson@sfgov.org



DENNIS J. HERRERA
City Attorney

PAULA JESSON
Deputy City Attorney

DIRECT DIAL: (415) 554-6762

E-MAIL: paula.jesson@sfgov.org

MEMORANDUM

TO: Ellen Tsang
FROM: Paula Jesson
Deputy City Attorney
DATE: December 22, 2009
RE: Petition to the Supervisor of Records – Building Permit Application in Electronic Format

You asked the City Attorney's Office to assist you in obtaining a record that you have requested from the Department of Building Inspection ("DBI"). DBI has the record, a permit application, in "hard copy" and has offered to provide it to you. You have asked for the record in electronic form, which DBI declines to provide. You have informed this office that you consider DBI legally obligated to provide the record in electronic form.

We review your request to this office as a petition to the Supervisor of Records under the San Francisco's Sunshine Ordinance, San Francisco Administrative Code Section 67.21(d) ("Section 67.21(d)"). The role of the Supervisor of Records is limited to determining, in the language of that section, "whether the record requested, or any part of the record requested, is public." Because the scope of this office's role is limited under Section 67.21(d), we generally do not address claims of violations under public record laws other than the claim that a City department is unlawfully withholding, or unlawfully redacting portions of, a record that should be disclosed.

There is no dispute between you and DBI regarding the public nature of the record that you requested. DBI has offered to provide it to you as a "hard copy." You seek the same record in a different format. Therefore, the issue you raise is not one that the Supervisor of Records normally considers under Section 67.21(d).

Nevertheless, in an effort to be of assistance, the Supervisor of Records has sought additional information regarding DBI's procedures for maintaining records and for providing copies to the public.

DBI records are maintained in various types of formats, including 16mm microfilm rolls, 35mm microfilm rolls, aperture cards, Papervision files using a TIFF format, and original paper documents if scanning has not yet occurred. The building permit application that you seek (No. 20053086970) is maintained in Papervision.

To produce a record electronically from microfilm, aperture cards, or Papervision files, DBI staff must locate the record by researching multiple databases such as DOC INDEX, Permit Tracking System, Papervision, and aperture cards. After the record has been located, staff must make a photocopy from that format, manually scan the printed version through a copy machine, convert the paper copy into a PDF format, save the PDF on the server and index the file. Once the file has been saved, staff must attach a copy of the converted file into Lotus Notes and then email it to the customer. If the file is too large to email, it cannot be accommodated by the City's systems.

CITY HALL • 1 DR. CARLTON B. GOODLETT PLACE, ROOM 234 • SAN FRANCISCO, CALIFORNIA 94102

RECEPTION: (415) 554-4700 FACSIMILE: (415) 554-4699

n:\government\pjesson\supervisorofrecords\tsang09.doc

Memorandum

TO: Ellen Tsang
DATE: December 22, 2009
PAGE: 2
RE: Petition to the Supervisor of Records – Building Permit Application in Electronic Format

If DBI were required, when requested by a member of the public, to provide a record in electronic format when the record is maintained in microfilm, aperture card or Papervision, staff would have to go through the steps described above. The burden on the Department's resources would be significant due to the high volume of record requests. For example, in fiscal year 2007-2008, members of the public and City agencies requested 11,713 records maintained by the Department (about 80% of these requests are from members of the public). One request for records may involve as many as 900 aperture cards and each aperture card can hold up to 10 pages. In response to the 11,713 requests, DBI provided the following: 106,286 copies of permits/job cards/CFCs, 54,020 copies of plans, and 22,729 diazo cards for viewing plans.

To make records accessible to the public, DBI has posted on its website information about its records (including permit applications). This is searchable by permit application number, street address or block and lot number. See <http://dbiweb.sfgov.org/dbipts/>. The website has a substantial amount of information including description of work, stages of permit process, City employees who reviewed and approved the project, and agents involved with the project, all of which is basically a summary report of the permit. This information covers building permits from 1996 to the present (it also covers plumbing and electrical permits, and complaint information, but for shorter time periods, with the time period differing for the differing categories of records). The information posted on this website is available 24 hours a day, 7 days a week. In addition, DBI posts on the website monthly reports for filed, issued, and demolition permits, which also contain the same information.

While it may be appropriate in some cases for the Supervisor of Records to make a determination on issues relating to the form of the record sought, even if the department does not dispute that the record is public, there are no compelling circumstances here for the Supervisor of Records to make such a determination. However, we hope that this response has been informative and helpful.

P.J.

**Supervisor of Records Response to Crossman 1/12/10 Petition RE: 12/11/09 request
for a document "in native Word format" **

Adine Varah to: kimo, kimocrossman

01/21/2010 01:33 PM

Bcc: Matt Dorsey, Buck Delventhal, Paula Jesson, Paul Zarefsky

Dear Mr. Crossman,

I am writing in response to your January 12, 2010 petition (copy attached as a pdf) with the Supervisor of Records regarding the response by the City Attorney's Office to your request of December 11, 2009, addressed to Deputy City Attorney Paula Jesson, for a copy of the latest Supervisor of Records report to the Sunshine Ordinance Task Force "in native Word format."



KCrossman Petition To SOR_1-12-10.PDF

Ms. Jesson responded on December 15, 2009, as follows:

You have asked for latest Supervisor of Records report to Sunshine Ordinance Task Force. This office provided the report to the Task Force in PDF (we assume that you have already obtained it in that format, but if you have not done so and would like to receive a PDF of the report, let me know). We decline to produce it in Word. City departments may decline to produce a record in Word format for the reasons set forth in the opinion of this office dated September 19, 2006, which is available on the City Attorney's website at:

<http://www.sfcityattorney.org/Modules/ShowDocument.aspx?documentid=105>

Moreover, the report in Word would have metadata that constitutes attorney work product, which is protected from disclosure under California Government Code Section 6254(k) (public agencies not required to disclose documents where disclosure is exempted or prohibited by federal or state law) and California Code of Civil Procedure Section 2018.030 (protecting as work product writings that reflect an attorney's impressions, conclusions, opinions or legal research or theories).

On December 15, 2009, you sent a message to Ms. Jesson, making the following request:

Please run the free hidden data removal tool on the native word doc and send it over. While this may remove some metadata which is actually discloseable I am ok with it. (This is a request for that easily generated format)

On January 8, 2010, Ms. Jesson responded, declining to perform the process that you suggested and stating as follows:

The reasons that we decline to do so are set forth in the September 19, 2006 opinion on the City Attorney's website (already mentioned in my earlier response to you). City

departments are not required to go through electronic procedures to produce a document in Word when it has been produced in PDF, and we decline to do so here.

On January 8, 2010, you emailed Ms. Jesson a message stating that "Unfortunately, this matter has been sent on appeal to the supervisor of record which you cannot rule on due to conflict of interest." Ms. Jesson thereafter inquired when you had filed the appeal and, when you forwarded to her a copy of the message with your petition to the Supervisor of Records dated December 17, 2009, she informed you that she had never received it. This office therefore received your petition for the first time on January 12, 2010.

In addition to seeking review of the decision declining to provide the requested record in Word, your petition asserts that it would be a "conflict of interest" for this office to rule on the petition. You suggest that we refer the matter to outside counsel, stating: "I am told that this is typically Oakland or Alameda CA." We disagree with your contention that it would be inappropriate for the City Attorney's Office to make a determination on your petition and address this preliminary issue first.

Section 67.21(d) of the San Francisco Sunshine Ordinance creates the function of the Supervisor of Records. S.F. Admin. Code Section 67.21(d) ("Section 67.21(d)"). That section gives to a person who requests a record but believes that the custodian of the records has failed to comply with the request, or has complied incompletely, the right to petition the Supervisor of Records for a determination whether the record requested is public. The Sunshine Ordinance defines the term "Supervisor of Records" to mean the City Attorney. S.F. Admin. Code Section 67.20.

Nothing in the Sunshine Ordinance creates a procedure for petitions to the Supervisor of Records seeking review of the City Attorney's Office that is different from the procedure for reviewing any other department. We presume that the drafters of this provision, and the voters who adopted it, were aware that petitions may involve the office designated to serve as the Supervisor of Records. Therefore, the voters approved the City Attorney's Office serving as Supervisor of Records with regard to all departments, including the City Attorney's Office. Further, in the absence of a provision in the Sunshine Ordinance creating a separate procedure, there is no authority for another City official, or for a public official outside of City government, to assume the role of Supervisor of Records.

The administrative appeal procedure in Section 67.21(d) provides citizens with an inexpensive, simple, and relatively fast method of obtaining another level of review of – a second look at – a Department's response to a public records request. To enhance the effectiveness of the second look as Supervisor of Records, the general practice of this office, though not legally required, is to assign a deputy in this office who was not involved in the initial decision on the public records request to review and respond to petitions to the Supervisor of Records, no matter what City department received the initial request. For example, a deputy who has advised the Department of Public Works when it responded to a public records request is not the deputy assigned to review the matter as Supervisor of Records. Similarly, when a deputy responds to a request for records from the City Attorney's Office, the Office does not assign that deputy to

make the determination as Supervisor of Records. We have followed that practice in this appeal.

Turning to the substance of your petition, we note that the role of the Supervisor of Records is limited. Section 67.21(d) requires the Supervisor of Records to determine "whether the record requested, or any part of the record requested, is public." Because the scope of this office's role is limited under Section 67.21(d), we generally do not address claims of violations under public record laws other than the claim that a City department is unlawfully withholding, or unlawfully redacting portions of, a record that should be disclosed.

In this matter, there is no dispute regarding the public nature of the record that you requested. This office has provided the record in PDF to the Sunshine Ordinance Task Force from which any member of the public may obtain a copy. In addition, Ms. Jesson offered to provide it to you in PDF if you had not already obtained it in that format. In this appeal, you seek a determination that a department that has already made a record publicly available must also provide it in a different format. This issue is not the type of issue that the Supervisor of Records normally considers under Section 67.21(d).

However, your petition raises an issue that has already been fully considered in an opinion dated September 19, 2006 and made publicly available on the City Attorney's website.

Moreover, you have already sought and obtained a determination from the Supervisor of Records on a request for a document in Word which this Office declined to provide. In May of 2008, you requested the Word version of a letter and attachment setting forth the written charges of official misconduct against a former member of the Board of Supervisors. In support of your petition, you cited various provisions of the California Public Records Act and the San Francisco Sunshine Ordinance. The Supervisor of Records denied your petition, noting that she had reviewed the provisions that you cited and nonetheless found the September 19, 2006, opinion reached the correct conclusion.

Finally, your request relates to a record prepared by an attorney. State law protects from public disclosure work product writings that reflect an attorney's impressions, conclusions, opinions or legal research. California Government Code Section 6254(k) and California Code of Civil Procedure Section 2018.030. The PDF format for the record that you requested, the annual Supervisors of Records report, provides the text of the report publicly issued by the City Attorney's Office. In its Word format, the record would disclose information that is protected by the attorney work product doctrine. Therefore, your petition necessarily involves material protected from disclosure under State law.

For these reasons, the Supervisor of Records denies your petition.

Sincerely,

Adine Varah
Deputy City Attorney
City and County of San Francisco

City Hall, Room 234
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102-4689

(415) 584-4670 (tel)
(415) 584-4747 (fax)
Adina.Varah@sfgov.org

Kimo Crossman

On Tue, Jan 12, 2010 at 10:04 AM, Kimo Cross...

01/21/2010 09:04:25 AM



Kimo Crossman
<kimo@webnetic.net>
Sent by:
kimocrossman@gmail.com

01/21/2010 09:04 AM

Please respond to
kimo@webnetic.net

To Paula Jesson <home@prof.org>, Allen Grossman
<[REDACTED]>, SF City Attorney Supervisor of
Records Adina Varah <Adina.Varah@sfgov.org>, Matt
Dorsey <Matt.Dorsey@sfgov.org>, SOTF <sotf@sfgov.org>,
Richard Knes <[REDACTED]>, SOTF
<jerry.threat@sfgov.org>, "buck.dalventhal"
<buck.dalventhal@sfgov.org>, Paul Zarofsky
<Paul.Zarofsky@sfgov.org>, Board of Supervisors
<Board.of.Supervisors@sfgov.org>

cc

Subject (4) OVERDUE APPEAL: Immediate Disclosure Request -
latest Supervisor of Records report to SOTF (easily
generated)

On Tue, Jan 12, 2010 at 10:04 AM, Kimo Crossman <kimo@webnetic.net> wrote:
The City Attorney refuses to provide the Word version of a PDF file This is the ongoing
dispute.

On Fri, Jan 8, 2010 at 10:40 AM, Kimo Crossman <kimo@webnetic.net> wrote:

On Wed, Jan 6, 2010 at 5:43 PM, Kimo Crossman <kimo@webnetic.net> wrote:

On Thu, Dec 17, 2009 at 5:10 PM, Kimo Crossman <kimo@webnetic.net> wrote:
This is an Appeal to the Supervisor of records for this easily generated Word doc.
Since this it is a conflict of interest of your office to rule on this matter I request that we
send it to outside counsel. I am told that this it typically Oakland or Alameda CA
Seven day clock now begins.

thank you.

On Wed, Dec 16, 2009 at 10:48 PM, Kimo Crossman <kimo@webnetic.net> wrote:
easily generated?



DENNIS J. HERRERA
City Attorney

PAUL ZAREFSKY
Deputy City Attorney

DIRECT DIAL: (415) 554-4652
E-MAIL: paul.zarefsky@sfgov.org

April 23, 2010

BY U.S. MAIL AND E-MAIL ATTACHMENT

[REDACTED]
San Francisco, CA [REDACTED]

Re: Petition to Supervisor of Records
In re Department of Emergency Management
DECISION OF SUPERVISOR OF RECORDS

Dear [REDACTED]

This letter constitutes the decision of the Supervisor of Records on your petition, which is described more fully below.

I. Your Public Records Requests

Your petition concerns the responses of the Department of Emergency Management (the "Department") to various requests for CAD 911 reports pertaining to you. A "CAD 911" report is a computer-assisted dispatch report that relates the substance of a 911 call and certain follow-up investigation made in response to the call. The materials included in your petition to the Supervisor of Records cover the following public records requests that you submitted to the Department. For convenience, we have numbered your four requests, 1 through 4, and will use those designated numbers throughout this letter.

1. October 21, 2009 – Request for CAD 911 report #092933534, pertaining to an incident at your residence on October 20, 2009, at about 8:00 p.m.
2. October 31, 2009 – Request for CAD 911 report #093041873, pertaining to an incident at your residence on October 31, 2009, at about 2:00 p.m.
3. November 5, 2009 – Request for CAD 911 report #071323063, pertaining to an incident at your residence on May 29, 2007, at 11:20 a.m.
4. December 14, 2009 – Request for "any record [the Department] holds pertaining to my history."

II. The Department's Responses to Your Public Records Requests

The Department responded to Requests 1-3 by providing the CAD 911 transcripts that you had requested, but with personal information, characterized as "names, address, and telephone numbers" redacted, and "privileged law enforcement database records" also redacted. From our review of those records, it appears that only the transcript provided in response to Request 3 redacted law enforcement information. In response to Request 4, the Department provided no responsive records, stating that the request was overbroad and that "searches are made using a specific date, time, and location." The Department also stated that the request pertained to records "other than your own."

III. Discussion

CITY HALL • 1 DR. CARLTON B. GOODLETT PLACE, ROOM 234 • SAN FRANCISCO, CALIFORNIA 94102
RECEPTION: (415) 554-4700 FACSIMILE: (415) 554-4747

n:\government\pzarefsk\supv-pr\brotherton2 decision on petition.doc

Letter to [REDACTED]
April 23, 2010

Your petition to the Supervisor of Records raises three issues, which we will discuss separately:

- For Requests 1-3 – the requests for CAD 911 reports for specific 911 calls – whether the redactions of callers' personal information were warranted;
- For Request 3, whether the redaction of certain law enforcement information was warranted; and
- For Request 4 – the request for any record the Department holds pertaining to your history – whether the Department's failure to produce any responsive records was warranted.

A. Redaction Of Personal Information About Caller

California Government Code § 6254(c) authorizes the City to withhold or redact records that are "[p]ersonnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy." Other provisions of law also authorize the withholding or redaction of records for reasons of personal privacy. *See, e.g.*, Cal. Const., Art. I, sec. 1 (recognizing state constitutional right of privacy; incorporated into Public Records Act through Cal. Gov. Code § 6254(k)); S.F. Admin. Code § 67.24(d)(2) (authorizing withholding of "personal or otherwise private information" in a law enforcement investigative record, even if the investigation has been closed, if disclosure would constitute an "unwarranted invasion of privacy"); *see also* Cal. Gov. Code § 6254(f) (requiring disclosure of names of crime witnesses only to certain people, such as victims and insurance companies, and, even then, authorizing withholding if disclosure would endanger the safety of a witness or other person involved in the investigation). The law also protects against disclosure of the identity of persons who report possible violations of law to City authorities, where disclosure would be against the public interest. Cal. Evid. Code § 1041.

The Department's determination that callers' personal information should be redacted from CAD 911 reports on the basis of privacy is reasonable and well-founded. Calls to 911 often involve the caller's reporting either a violent situation or one where there is potential for violence, or reporting a possible violation of law. Often the caller is asking the police to come to the scene, and possibly arrest the person who is the subject of the call. Even if an arrest is not involved, and even if the situation prompting the call does not necessarily raise the possibility of violence, the 911 call often results in intervention by police or other authorities that the subject of the call will naturally resent. If he or she is made aware of who the caller is, in some cases the safety and security of the caller may be jeopardized.

The Department has reasonably concluded that prudence dictates that it redact personal information pertaining to the caller, including the caller's name and contact information. While safety and security concerns are not always presented by disclosure of the caller's identity and contact information, the concerns are substantial enough to warrant the redactions. Calls to 911 may come from a neighbor of the subject of the call, or from one who lives in the same apartment building or house, or from one who otherwise is known to the subject or has close contact with the subject. There is no meaningful way for the Department to determine which calls might present safety and security concerns for the caller if the caller's identity and contact information is disclosed, and which might not. Further, a case-by-case evaluation of whether the subject of the call already knows the caller's identity would be prone to error.

In addition, even where there is no safety or security concern in disclosing a caller's personal information, disclosure may result in callers receiving follow-up calls and other intrusions by the media or other persons. Though not determinative in our analysis, this concern also implicates the caller's privacy.

Letter to [REDACTED]
April 23, 2010

Finally, the Department, which has more expertise than this Office in the operational dimensions of 911 systems, has expressed a practical concern that is an outgrowth of the privacy concerns discussed above. The Department believes that if it makes CAD 911 reports available without redacting the caller's identity and contact information, the 911 system would be undermined. In the Department's expert judgment, some people would choose not to call 911, or would provide less information in a call, if it became known that the identity of the caller and contact information would be released to the public.

For these reasons, we conclude that the Department acted lawfully in redacting callers' identity and contact information from the CAD 911 reports in issue.

B. Redaction Of CLETS Data About Person Who Is The Subject Of A 911 Call

In response to Request 3, the Department redacted a large part of the CAD 911 report. We have determined that the information redacted is what is called "CLETS" data. CLETS – which stands for California Law Enforcement Telecommunications System – is a system created under state law for the retrieval by law enforcement personnel of criminal justice information such as arrests and convictions about a particular person. *See generally* Cal. Gov. Code §§ 15150-15167. It is common for police who are responding to a 911 call to run an electronic check of a person's criminal justice history, and that is what happened with respect to the call that resulted in the CAD 911 report provided in response to Request 3.

Numerous provisions of law restrict access to CLETS data. *See, e.g.*, Cal. Penal Code §§ 11075-11081, 11105, 13200-13203, 13300-13305; Cal. Vehicle Code §§ 1808 et seq. The information is considered highly sensitive and only to be used for law enforcement purposes. Indeed, criminal penalties may be imposed for unauthorized disclosure of CLETS data. *Gilbert v. City of Sunnyvale* (2005) 130 Cal.App.4th 1264, 1281. And employees may be disciplined to the point of termination for unauthorized disclosure. *See, e.g., Bellizzi v. San Diego County Civil Service Commission* (2008) 2008 WL 4383076 (Cal. App. 4th Dist.) (unreported decision). Stated simply, the Department is not authorized to release this data to you.

Accordingly, we conclude that the Department acted lawfully in redacting this data from the CAD 911 report it supplied to you in response to Request 3. Cal. Gov. Code § 6254(k) (exempting from disclosure "[r]ecords the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code pertaining to privilege"); Cal. Gov. Code § 6276.12 (expressly incorporating in Public Records Act certain Penal Code provisions prohibiting disclosure of CLETS data); Cal. Evidence Code § 1040(b)(1) (privilege to not disclose information acquired in confidence where disclosure is forbidden by state or federal law).

C. Failure To Provide Other CAD 911 Reports Pertaining To Petitioner

Request 4 was more open-ended in nature than Requests 1-3. In response to the request for "any record [the Department] holds pertaining to my history," the Department stated, in part, that the request was overbroad. The Department indicated that searches of CAD 911 transcripts "are made using a specific date, time, and location." It is our understanding that the Department does not have CAD 911 reports indexed in a manner that corresponds to your request, and the information in the CAD reports is not retrievable by name of the subject of the 911 call. The Department has further indicated to this Office that a manual review of all CAD 911 transcripts is infeasible because of the large volume of transcripts; there literally are thousands.

Letter to [REDACTED]
April 23, 2010

The law does not require the Department to conduct a search for records that amounts to looking for "a needle in a haystack." *California First Amendment Coalition v. Superior Court* (1998) 67 Cal.App.4th 159, 166. Accordingly, the Department acted lawfully in not providing records responsive to Request 4. The Department's response indicated that a more focused request for records based on date of the 911 call or location of the subject of the call would have enabled it to search through its CAD 911 transcripts for additional records.

While the Department's response to Request 4 was lawful, we have nevertheless requested the Department to search the CAD 911 transcripts for records pertaining to your residence address, since the CAD 911 transcripts that were the subject of your other records requests all pertained to that address. It is our understanding that the Department has located additional CAD 911 transcripts pertaining to that address and to you, and that the Department will be providing those records to you, with appropriate redactions.

DENNIS J. HERRERA
City Attorney



Paul Zarefsky
Deputy City Attorney

cc: David Eberle
Annette Goley
Department of Emergency Management



DENNIS J. HERRERA
City Attorney

OFFICE OF THE CITY ATTORNEY

PAUL ZAREFSKY
Deputy City Attorney

DIRECT DIAL: (415) 554-4452
E-MAIL: paul.zarefsky@sfgov.org

March 15, 2010

BY U.S. MAIL AND E-MAIL ATTACHMENT

Mr. Ross C. Wilkinson

San Francisco, CA

Re: Petition to Supervisor of Records Concerning the Office of the Mayor
DECISION OF SUPERVISOR OF RECORDS

Dear Mr. Wilkinson:

This letter responds to your petition to the Supervisor of Records. Your petition relates to a public records request you submitted to the Office of the Mayor, dated January 27, 2010. The request sought "[a]ll public information transmitted to you and your predecessors advocating that the Mayor appoint any of the following rent board members or from you and/or your predecessors in response to any such advocacy: Polly Marshall, Cathy Mosbrucker, Deborah Henderson, Dave Crow." Your petition to the Supervisor of Records asserts that "Mayor Newsom has failed to comply with my request for production of documents under the Sunshine Ordinance."

In response to your public records request, Joe Arellano, Deputy Communications Director for the Mayor, sent a letter to you, dated February 2, 2010, in which Mr. Arellano stated: "All responsive documents are attached." There were two documents attached: The notice of appointment of Dave Crow to the Rent Board, dated July 15, 2008, and sent to the Board of Supervisors; and the notice of appointment of Cathy Mosbrucker to the Rent Board, dated August 10, 2006, and sent to the Clerk of the Board of Supervisors.

In our judgment, it is not accurate to characterize these two documents as responsive to the request, because they are not in the nature of advocacy documents in support of those appointees, or responses to advocacy documents. We have discussed this matter with Mr. Arellano. He has indicated that upon receipt of your public records request, there was a search of the relevant files in the Mayor's Office, and no advocacy documents or responses to advocacy documents pertaining to Ms. Marshall, Ms. Mosbrucker, Ms. Henderson, or Mr. Crow were found. The two documents he forwarded to you in response to your request did involve the appointment of two of the four Rent Board members mentioned in your request.

Based on Mr. Arellano's representation that the Office of the Mayor has no records responsive to your request, and had no such records at the time you made the request, there is no issue for the Supervisor of Records to review. In the role of Supervisor of Records, we do not independently review departments' search efforts in response to a public records request. Rather, we determine whether records that are responsive to a request are public records that must be disclosed to a requester. When a department has no responsive records, our review comes to an end.

Accordingly, we will close our file on this matter once we receive written confirmation from Mr. Arellano that the Office of the Mayor has no records responsive to your request, and had no such records at the time the Office of the Mayor received your public records request.

CITY HALL • 1 DR. CARLTON B. GOODLETT PLACE, ROOM 234 • SAN FRANCISCO, CALIFORNIA 94102
RECEPTION: (415) 554-4700 FACSIMILE: (415) 554-4747

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Letter to Mr. Ross C. Wilkinson

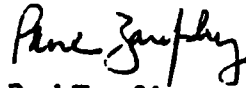
Page 2

March 15, 2010

We have asked Mr. Arellano that this written confirmation be in the form of a letter to you, supplementing the response he sent to you dated February 2, with this Office receiving a copy.

Very truly yours,

DENNIS J. HERRERA
City Attorney



Paul Zarefsky
Deputy City Attorney

cc: Mr. Joe Arellano



DENNIS J. HERRERA
City Attorney

ADINE VARAH
Deputy City Attorney

DIRECT DIAL: (415) 554-4670

E-MAIL: adine.varah@sfgov.org

May 28, 2010

VIA ELECTRONIC MAIL
Mr. Kimo Crossman
kimocrossman@gmail.com
kimo@webnetic.net

Re: Appeal to Supervisor of Records – Redaction of Personal E-Mail Addresses

Dear Mr. Crossman,

I am writing in response to your May 17, 2010 e-mail message and appeal to the Supervisor of Records. Your appeal concerns the Clerk of the Board of Supervisors' redaction of personal "contact e-mail addresses on [a Sunshine Ordinance Task Force] application."

The City has the authority to redact personal e-mail addresses in order to protect individual's privacy under Section 6254(c) of the Public Records Act and under Article 1, Section 1 of the California Constitution. The City Attorney's Office has analyzed this issue in depth in the May 15, 2007 letter to the Sunshine Ordinance Task Force regarding the "Confidentiality of Commissioner's Personal E-Mail Addresses." I have attached a copy of that letter to you for your reference. The Supervisor of Records agrees with the analysis in that opinion.

In addition, Supervisor of Records Paula Jesson wrote to you on December 5, 2007, regarding your objection to the redaction of email addresses in the attachments to the Eighth Annual Supervisor of Records Report. In that response, Ms. Jesson stated that "the release of personal email addresses implicates privacy concerns" and cited the May 15, 2007 City Attorney memorandum noted above.

Moreover, now a very substantial body of cases directly addresses the issue of the privacy of personal e-mail addresses under the federal Freedom of Information Act (FOIA). Those rulings confirm that redaction of private e-mail addresses is proper under public records laws.

In *Electronic Frontier Foundation v. the Office of the Director of National Intelligence*, the United States Court of Appeal for the Ninth Circuit, in upholding the government's redaction of telecommunications carriers' agents' personal e-mail addresses, stated that the court could "easily envision possible privacy invasions resulting from public disclosure of the email addresses" and that disclosure of personal e-mail addresses "may add to the risk of privacy invasion with little additional benefit to the public interest." No. 09-17235, 2010 WL 1407955 at*10 (9th Cir. April 9, 2010); see also *Forest Serv. Employees for Envt'l Ethics v. U.S. Forest Serv.*, 524 F.3d 1021, 1025 (9th Cir. 2008) ("[I]nformation about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct is not the type of information to which FOIA permits access.") (internal quotation marks omitted).

Letter to Mr. Kimo Crossman

Page 2

May 28, 2010

Similarly, the United States District Court for the District of Columbia recently ruled that the State Department properly withheld "personal email addresses of several individuals" who applied to serve on a board of a foundation that receives State Department funding as well as start-up support through a State Department contract with another foundation. *Government Accountability Project v. U.S. Department of State*, No. CIV.08-1295, 2010 WL 1222156 at * 6-7 (D.D.C. March 29, 2010). The court held that the "private individuals mentioned in these records have a clear privacy interest in avoiding the disclosure of their personal email addresses. ... [f]urthermore, releasing their email addresses serves no public interest because these email addresses would not reveal 'what the government is up to.' To the contrary, release of the excised addresses would constitute a clearly unwarranted invasion of privacy. Thus the State Department properly withheld [the personal e-mail addresses]" *Id.* at 7.

As noted above, courts have repeatedly upheld the redaction of personal e-mail addresses under FOIA in order to avoid an unwarranted invasion of personal privacy. *See, e.g., Wilson v. U.S. Air Force*, No. CIV.A.5:08cv324, 2009 WL 4782120 at * 4 (E.D. Ky. Dec. 9, 2009), *Nulankeyutmonen Nkihtaqmikon v. Bureau of Indian Affairs* 493 F.Supp.2d 91, 108 (D. Maine 2007), *Reliant Energy Power Generation, Inc. v. F.E.R.C.*, 520 F.Supp.2d 194, 207 (D.D.C. 2007); *Judicial Watch, Inc. v. Export-Import Bank* 108 F.Supp.2d 19, 38 (D.D.C. 2000).

Although FOIA is a federal public records law, California courts consult FOIA case law to ascertain the meaning and application of provisions in the California Public Records Act that are analogous or identical to FOIA provisions. *See, e.g., Michaelis, Montanari & Johnson v. Superior Court*, 38 Cal.4th 1065, 1076 (2006); *Times Mirror Co. v. Superior Court*, 53 Cal.3d 1325, 1338 (1991). The FOIA case law cited above is particularly instructive here, because the FOIA privacy exemption considered in those cases is virtually identical to Section 6254(c) of the Public Records Act. FOIA Exemption 6 covers "personnel and medical files and similar files the disclosure of which would constitute a *clearly* unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6) (emphasis added). Section 6254(c) covers "[p]ersonnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of privacy." Cal. Gov. Code § 6254(c). The only difference between the two provisions is that FOIA Exemption 6 requires a "clearly" unwarranted invasion of privacy whereas Section 6254(c) does not. The FOIA case law protecting personal e-mail addresses thus is particularly instructive here, because Exemption 6 arguably sets a higher standard for an invasion of privacy than Section 6254(c) sets.

In light of the above, we agree that the Clerk's redaction of private e-mail addresses was appropriate under our state and local public records laws.

Very truly yours,

DENNIS J. HERRERA
City Attorney



Adine Varah (Acting Supervisor of Records)
Deputy City Attorney

cc: Paula Jesson, Supervisor of Records



DENNIS J. HERRERA
City Attorney

PAULA JESSON
Deputy City Attorney

DIRECT DIAL: (415) 554-6762

E-MAIL: paula.jesson@sfgov.org

MEMORANDUM

TO: Kimo Crossman
FROM: Paula Jesson
Deputy City Attorney
DATE: July 29, 2010
RE: Petition to Supervisor of Records – Mayor's Office Calendars and Other Records

You submitted a petition to the Supervisor of Records on July 19, 2010 regarding a public records request that you submitted to the Mayor's Office.

You requested public records sent to the SF Examiner the day of your request, including the Mayor's calendar and any faxes and emails from the Mayor's Communications staff including private accounts. You asked that documents in paper form be scanned and sent by PDF; that deleted records be provided with the description and count; that deleted records be retrieved from archives; and that you be provided the reason for the initial deletion.

You also requested "the two business days prior Prop G calendar" for the Mayor, Tony Winnicker and Steve Kawa.

Lily Madjus of the Mayor's Office of Communications responded by sending a PDF copy of an email sent to the SF Examiner and by informing you that the Mayor's calendar can be accessed by going to a specified website. Ms. Madjus also informed you that there were no responsive documents to the request for Tony Winnicker's calendar and invoked additional time to respond to the request for Steve Kawa's calendar.

Your petition states that you have "not received the fully detailed Prop G calendar for the Mayor nor other individuals [you] requested," that you received no response to your inquiry "regarding deleted records," and that the Mayor's office had "illegally invoked a ten day extension for a Prop G calendar which should already exist and been delivered."

With respect to the Mayor's calendar, your petition seeks a review with respect to the Mayor's Prop G calendar for July 8 through July 12, 2010.

Public Records Sent to SF Examiner

For your information, Ms. Madjus has informed the Supervisor of Records that she has additional records responsive to your request for documents sent to the SF Examiner, which she will provide to you.

Request for Mayor's Prop G Calendar

Ms. Madjus has informed the Supervisor of Records that she will send you a revised Prop G calendar for the Mayor for July 8 through July 12, 2010. The revised Prop G calendar shows no meetings or events for the Mayor for July 8 through 11. Ms. Madjus has informed the Supervisor of Records that during those four days the Mayor had no meetings or events as defined in S.F. Admin. Code §67.29-5.

Memorandum

TO: Kimo Crossman
DATE: July 29, 2010
PAGE: 2
RE: Petition to Supervisor of Records – Mayor's Office Calendars and Other Records

In light of the agreement of the Mayor's Office to provide this additional information, the Supervisor of Records finds your petition moot with respect to this issue.

Request for Steve Kawa's Calendar

Ms. Madjus has informed the Supervisor of Records that the Mayor's Office will provide you with a copy of Steve Kawa's calendar for the time period covered by your July 12, 2010, request. In light of this fact, the Supervisor of Records finds your petition moot with respect to this issue.

Request for Tony Winnicker's Calendar

Mr. Winnicker has confirmed that he does not maintain a calendar and therefore the Mayor's Office correctly responded that it had no records responsive to your request. Although you assert that Mr. Winnicker is required to maintain a Prop G calendar, the calendar requirement only applies to the Mayor, the City Attorney and department heads. S.F. Admin. Code §67.29-5. Neither Mr. Kawa nor Mr. Winnicker is a department head.

Accordingly, your petition is denied as to this issue.

Deleted Records

You had asked the Mayor's office to provide you with a description and count of deleted records and the reason for the deletion. You also asked that any deleted record be retrieved from the archive.

The role of the Supervisor of Records is limited to determining whether a record that has been requested is public and should be disclosed. It is not clear that it extends to the issues you raise with respect to deleted records. In any event, the Supervisor of Records finds it unnecessary to address the issue because Ms. Madjus has informed the Supervisor of Records that she had no deleted records to report in responding to your request.

Accordingly, the Supervisor of Records finds that the issues involving deleted records are moot.

Invoking Additional Time

As to your request for Mr. Kawa's calendar, your petition states that the Mayor's Office "illegally invoked a ten day extension for a Prop G calendar which should already exist and been delivered." This issue is moot in light of the agreement by the Mayor's Office to provide you with Mr. Kawa's calendar.

Summary

Accordingly, your petition is moot with respect to the issues noted and the remainder is denied.

P.J.



DENNIS J. HERRERA
City Attorney

PAULA JESSON
Deputy City Attorney

DIRECT DIAL: (415) 554-6762

E-MAIL: paula.jesson@sfgov.org

MEMORANDUM

TO: Kimo Crossman
FROM: Paula Jesson
Deputy City Attorney
DATE: August 19, 2010
RE: Petition to Supervisor of Records – Mayor's Office Calendars and Other Records

You submitted a petition to the Supervisor of Records relating to a request for records from the Mayor's Office. The Supervisor of Records made a determination on July 29, 2010, denying the petition and noting that the Mayor's Office would provide you with additional records. On August 4, 2010, after you received the additional records, you submitted a "continuing appeal," raising the issues addressed below. For the reasons provided, the Supervisor of Records denies your petition.

Issue No. 1. You assert that the determination of the Supervisor of Records was inadequate because it did not determine why the Mayor's Office did not produce the additional records when it initially responded to your request, or state what exemption justified the withholding.

Response. The role of the Supervisor of Records is limited to determining whether a record that has been requested is public. This role does not include determining the reason for a department's initial response.

Issues No. 2-6. You describe certain types of communication (phone calls, text messages, etc.) and times (outside business hours) and locations/attendees (meetings outside City Hall with people affected by city actions) that you do not see on calendars provided by the Mayor's Office for the Mayor and Mr. Kawa. You suggest that such matters should have been included and that their absence demonstrates that the calendars are legally insufficient. You find additional evidence of legal insufficiency in the absence of calendar entries for the Mayor for several days.

In a related comment, after stating that the response of the Mayor's Office to your original request was not "complete" or "lawful," you state: "It is the responsibility as part of the Appeal for Supervisor of Records to examine all the relevant records and to demand their production. Instead you have just indicated that the records were forthcoming and did not examine their completeness and lawfulness."

Response:

With respect to this office's role in insuring that a department's response is complete, the Supervisor of Records has addressed the issue in an earlier determination sent March 3, 2008. This earlier determination, responding to a petition involving records requested from the Mayor's Office of Housing (MOH), stated as follows:

CITY HALL • 1 DR. CARLTON B. GOODLETT PLACE, ROOM 234 • SAN FRANCISCO, CALIFORNIA 94102
RECEPTION: (415) 554-4700 FACSIMILE: (415) 554-4699

n:\government\pjesson\supervisorofrecords\kccalenx.doc

Memorandum

TO: Kimo Crossman
 DATE: August 19, 2010
 PAGE: 2
 RE: Petition to Supervisor of Records -- Mayor's Office Calendars and Other Records

Your concern here appears to be that MOH has not conducted an adequate search of its files for the records that you requested. This office's obligation under Section 67.21(d) assumes that a City department has located a record but is withholding it based on an exception from disclosure set forth in the Sunshine Ordinance or other applicable law. The role of the Supervisor of Records is to determine whether the City department is lawfully relying on the claimed exception, not to rule on the adequacy of a department's search for records. Given the limited role of the Supervisor of Records, we decline to address a complaint that a City department has not adequately searched for records in response to a public records request.

In determining whether a record that has been requested is public, the Supervisor of Records necessarily relies on City departments to search their files for responsive records and to provide the records to this office so that it can conduct the necessary review. In the experience of the Supervisor of Records, departments typically understand their legal obligation to conscientiously search their files for responsive records, but if there is any apparent need to remind a department of this requirement, the Supervisor of Records does so. If you have any reason to believe that the Mayor's Office has not undertaken an adequate search or otherwise has not produced all responsive records, you should address those concerns to that office.

With respect to your suggestion that the Mayor's calendar does not comply with the requirements of the Sunshine Ordinance, we note again that the role of the Supervisor of Records, although important, is limited. The Sunshine Ordinance does not impose on the Supervisor of Records the duty to make a general determination on whether a department has complied with the provisions of the Ordinance, but only the duty to determine whether the department is improperly withholding a record that should be made public.

With respect to Mr. Kawa's calendar entries, your comments assume that Mr. Kawa is a department head or otherwise required to comply with the calendar requirements that apply to the Mayor, the City Attorney, and department heads under San Francisco Administrative Code Section 67.29-5. As has already been noted, Mr. Kawa is not a department head and is not required to comply those requirements.

Issue No. 7.

You state that Mr. Kawa's calendar illegally redacts "Personal" meetings that happen in City Hall.

Response: When the Mayor's Office provided you with a copy of Mr. Kawa's calendar, it redacted an item and explained the redaction by writing "Personal" next to it. Lily Madjus of the Mayor's Office has informed the Supervisor of Records that the item redacted involved a matter that was personal to Mr. Kawa and unrelated to City business. City departments are required to produce "public records" upon request. A record is a "public record" if it contains "information relating to the conduct of the public's business." Government Code §6252(e). The entry on the calendar of a public employee involving only the employee's personal life may be redacted in order to prevent an unwarranted invasion of the employee's right to privacy. California Constitution Article I, section 1; Government Code §§6250 and 6254(c); San Francisco Administrative Code §67.1(g). It is unnecessary to consider whether a public official subject to the

Memorandum

TO: Kimo Crossman
 DATE: August 19, 2010
 PAGE: 3
 RE: Petition to Supervisor of Records – Mayor's Office Calendars and Other Records

requirements of San Francisco Administrative Code Section 67.29-5 governing the Prop G calendar would be entitled to redact the entry. As already noted, Mr. Kawa is not required to comply with the requirements of that Section.

Issue No. 8. You state that there has been no production of the Mayor's "Working Calendar" with appropriate security redactions which is discloseable under the California Public Records Act and preserved under Sunshine 67.29-7.

Response: The Mayor's "working calendar" contains information that is protected from disclosure, including private information about personal activities not required to be disclosed under San Francisco Administrative Code Section 67.29-5, private phone numbers and addresses of others, the identity of constituents who meet with the Mayor to petition their elected representative, the identity of whistleblowers or other persons who complain about violations of law, and information acquired in confidence from others. The Mayor's "working calendar" also contains security details that the Police Department uses as a security file to plan and execute security staffing and strategy.

The information described above is protected from disclosure under California Constitution Article I, section 1 (privacy) and Article I, section 3 (right to petition elected representatives); Government Code Sections 6250 and 6254(c) (privacy); San Francisco Administrative Code Section 67.1(g) (privacy); Evidence Code Sections 1040 (official information privilege) and 1041 (identity of informant privilege). The California Supreme Court recognized the right to withhold security information relating to a high-level government official in *Times Mirror Company v. Superior Court*, 53 Cal.3d 1325 (1991) (Governor not required to release his daily calendar). The Court based its decision on Government Code Section 6255, but Government Code Section 6254(f) also applies. That Section allows a public agency to deny access to "security procedures" and "security files."

By providing a calendar that meets the requirements of San Francisco Administrative Code Section 67.29-5, the Mayor is providing the equivalent of his "working calendar" properly redacted. Disclosure of the Prop G calendar meets the requirements of the Public Records Act and the Sunshine Ordinance.

Issue No. 9. You state that no calendar of any kind has been produced for Mr. Winnicker, and that Prop 59 covers writings of officials and is not limited to government owned devices.

Response: Mr. Winnicker has informed the Supervisor of Records that he does not maintain a calendar. The Supervisor of Records has no reason to believe that this representation is not accurate. If you have any reason to believe that the Mayor's Office has not undertaken an adequate search or otherwise not produced all responsive records, you should address your concerns to that office.

Issue No. 10. There is only one provided written response from Mr. Winnicker to many emails from the press – Where [sic] these never responded to in any written manner with any device – Prop 59 covers writings of officials and is not limited to government owned devices.

Response: Mr. Winnicker has informed the Supervisor of Records that he has no additional responsive records. The Supervisor of Records has no reason to believe that

Memorandum

TO: Kimo Crossman
DATE: August 19, 2010
PAGE: 4
RE: Petition to Supervisor of Records – Mayor's Office Calendars and Other Records

this representation is not accurate. If you have any reason to believe that the Mayor's Office has not undertaken an adequate search or otherwise has not produced all responsive records, you should address those concerns to that office.

P.J.



DENNIS J. HERRERA
City Attorney

PAULA JESSON
Deputy City Attorney

DIRECT DIAL: (415) 554-6762
E-MAIL: paula.jesson@sfgov.org

MEMORANDUM

TO: Edward Campbell
FROM: Paula Jesson *PJ*
Deputy City Attorney
DATE: August 13, 2010
RE: Petition to Supervisor of Records – San Francisco Fire Department

You submitted a petition to the Supervisor of Records regarding your public records request to the San Francisco Fire Department ("Department") for the following records.

1. A listing of all uniformed members by rank, who requested time-coming (TC) days off, including the race and gender of the member, the date they requested usage and the resulting decision, i.e., granted or not granted during the time period of September 1, 2008 through June 30, 2010
2. A listing of all uniformed members who called in sick during the time period of September 1, 2008 through June 30, 2010
3. A listing of all disciplinary actions taken against all members of the San Francisco Fire Department, including the race and gender of the member, specific charges and the resulting disciplinary action administered during the time period of September 1, 2008 through June 30, 2010

"Time-coming" ("TC") means time that employees of the Department have accrued for overtime work. An employee who wishes a paid day off may request to use accrued TC.

For positions that need to be back-filled when the employee is absent from work, the Department limits the number of slots available each day for approved TC. When the Department denies a TC request because of this limitation, it refers to the "quota" being "filled."

The Department's Response

The Department responded to your public records request as follows:

1. The Department only maintains TC records for the current calendar year. It deletes TC records for prior calendar years. Therefore, the Department provided you with records only for January 1, 2010 to July 9, 2010.

The records were in the form of a chart showing the number of days for which each employee requested the use of TC. Employees were not identified by name but the chart showed the employees' rank – such as H2, H30, or H50. The chart listed the number of days for which TC was granted, the number denied because the quota was filled, and the difference between the two. The Department informed you that it had redacted "personnel information" based on privacy considerations, citing Government Code Section 6254(c) (allowing public agencies to decline to disclose personnel, medical and similar records the disclosure of which would constitute an unwarranted invasion of privacy). The Department also informed you that none of the redacted information fell within the exceptions to withholding set forth in San Francisco

Memorandum

TO: Edward Campbell
 DATE: August 13, 2010
 PAGE: 2
 RE: Petition to Supervisor of Records – San Francisco Fire Department

Administrative Code Section 67.24(c)(7)), a provision of the Sunshine Ordinance discussed more fully below.

2. The Department declined to provide records of the uniformed members who called in sick during the specified time period based on the right to privacy.

3. The Department provided you with records of disciplinary actions taken against uniformed members of the Department for July 1, 2008 through June 30, 2010. The information was provided in a chart that listed the name of the employee disciplined, the employee's rank, the date of the incident giving rise to the discipline, the charges by reference to the rule violated, the discipline recommended, and the discipline imposed. But the Department redacted most of the entries on the chart on the ground that they constituted personnel information and were therefore exempt from disclosure based on the employees' right to privacy.

Analysis

Your petition requires consideration of two principles that, in the context of public records requests, are often in tension with one another. The first principle is the right of privacy, which the San Francisco Sunshine Ordinance addresses in its "Findings and Purpose" section:

(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 Administrative Code §67.1.

The California Constitution and the California Public Records Act also recognize the right of privacy. California Constitution Article I, section 1; California Government Code Sections 6254(c) (protecting personnel, medical and similar records the disclosure of which would constitute an unwarranted invasion of privacy) and 6250 (in adopting the Public Records Act, the Legislature is "mindful of the right of individuals to privacy").

The second principle, the strong interest of the public in monitoring government operations, is also addressed in the San Francisco Sunshine Ordinance:

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.

San Francisco Administrative Code §67.1; See also California Government Code Section 6250 (in adopting the Public Records Act, the Legislature "finds and declares that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state").

When considering requests for records, City departments must balance the privacy interests of affected individuals against the public's interest in monitoring government. See *Trentadue v. Integrity Committee* (C.A.10 2007), 501 F.3d 1215, 1233 (court must consider

Memorandum

TO: Edward Campbell
 DATE: August 13, 2010
 PAGE: 3
 RE: Petition to Supervisor of Records -- San Francisco Fire Department

whether release of private information in response to public records request under [the federal Freedom of Information Act] would "shed light" on the government's performance of the prevailing wage laws). In weighing the public interest in disclosure, public agencies must consider the extent to which the disclosure of the information will shed light on how the local agency conducts the public's business. *Commission on Peace Officers Standards and Training v. Superior Court*, 42 C.4th 278, 299 (2007).

The Good Government Guide issued by the City Attorney's Office provides an overview of the right to privacy in the context of personnel records (at p. 75, 2007-08 edition):

PRIVACY: PERSONNEL, MEDICAL OR SIMILAR FILES

Both state and local law recognize that the right to personal privacy sometimes precludes disclosure of public records. Govt. Code §§ 6250, 6254(c); Cal. Const., Art. I, §1; Admin. Code §67.1(g); Admin. Code Chapter 12M.

In some circumstances, there is an absolute statutory bar to disclosure of information based on the privacy interests of individuals In many circumstances, the bar to disclosure is not absolute, but is still high; there must be a strong justification before a department may release a record that compromises an individual's privacy. In either event, a City department may not disclose a record where disclosure would violate the right to privacy protected by federal or state law.

The department may decline to disclose personnel, medical or similar files, "the disclosure of which would constitute an unwarranted invasion of personal privacy." Govt. Code § 6254(c). But all personnel records are not automatically exempt. For example, members of the public are entitled to see records that contain an employee's name, job classification, current assignment, and actual wages earned including overtime. The City must also disclose the amount, basis or recipient of any performance-based increase in compensation, benefits or bonus awarded to any employee. Admin. Code § 67.24(c).

The Sunshine Ordinance also mandates disclosure of the job pool characteristics and employment and education histories of all job applicants who accepted employment with the City. Admin. Code § 67.24(c). Because of the right to privacy, the City may not disclose such personal information as the employee's home address, telephone numbers, personal email address, social security number, age, date of birth, ethnicity and marital status.

To the extent permitted by law, the Sunshine Ordinance requires the City to disclose records of an employee's confirmed misconduct. Admin. Code § 67.24(c)(7).

Records containing medical information about an employee pose special privacy concerns

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This excerpt refers to Section 67.24(c)(7) of the San Francisco Administrative Code, which provides that confirmed misconduct of City employees is not exempt from disclosure if it falls within the following categories: personal dishonesty; misappropriation of public funds, resources or benefits; unlawful discrimination against another on the basis of status; abuse of authority; and violence.

We now consider the Department's response to your request.

1. Time-Coming (TC) Information

You requested TC information for September 1, 2008 through June 30, 2010. The Department provided you with information beginning the first day of January in 2010, not the first day of September in 2008, because it does not retain records for prior calendar years. Because the Department has no TC records prior to January 1, 2010, it was unable to provide records from 2008 and 2009.

The records that the Department provided to you did not include the specific days for which TC was sought, nor the name, race or gender of the employees who requested TC.

We first consider the Department's withholding of the names of employees who requested TC. As explained above, the Department may withhold personnel information where disclosure would constitute an unwarranted invasion of personal privacy. Arguably, TC records contain no sensitive personal information. An employee who has accrued TC may request it for any reason, so the request does not disclose anything about an employee's health or medical condition. In contrast, an employee's request to use sick pay or to obtain a medical leave indicates that the employee has a medical problem, however temporary it may be. Therefore, the Department's release of the names of TC requesters would not, by itself, appear to impinge on the privacy interests of the requesters.

But the Department has a legitimate concern that the disclosure of personally identifiable time-off information, including TC records, could result in a disclosure of sensitive personal information. Such a result could occur if the Department were to disclose personally identifiable records showing the total time off taken by an employee for any reason for a specified time period and the total time-off taken for reasons other than illness or medical condition. By subtracting the time taken off for non-health purposes from the total time off taken, one can quickly figure out the amount of time off that the employee took because of illness.

To make public the dates or amount of time that an employee takes for medical reasons discloses highly personal information about the employee. Where the time taken off for illness is small, the invasion may be minor but still exists. Where the time taken off is great, this information could reveal a significant health problem.

Therefore, while the TC records do not directly contain sensitive personal information, their disclosure could, when combined with other time-off records, reveal protected information.

Disclosure of time-off information for identified employees, including sick pay records, would enable the public to monitor governmental operations. The public has a strong interest in knowing whether there is any corruption, inefficiency, prejudice, or favoritism in the administration of a public agency, including its administration of employee time-off programs.

The Department can provide you with TC records without employee names and has informed the Supervisor of Records that it is willing to do so. Data provided in this manner

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would enable the public to monitor the Department's administration of its time-off practices without impinging on the employees' privacy interests. In light of the availability of the TC records in this form, and of the potential invasion of employees' privacy interests if the records were produced with employee names, the Supervisor of Records finds that the Department properly withheld employee names from the TC records provided to you.

In responding to your request, the Department also withheld the race and gender of the employees who made TC requests. Employees also have a right to privacy in this information. With respect to race, the excerpt from the Good Government Guide above recognizes that ethnicity (information closely tied to race) is one of several types of personal information that City departments may not disclose. Gender also constitutes personal information the disclosure of which may impinge on the right to privacy. While many employees may not consider gender information sensitive, some will, including those who do not identify with the gender that a government institution has assigned to them or who are in the process of a medical procedure to change their gender.

Nor is it clear that the public interest in monitoring the improper use of time-off is advanced by knowing the race and gender of individual employees.

As noted above, the Department can provide TC records without employee names. In this situation, providing employees' race and gender with the other time-off information, including the employee's rank, does not invade the employees' right to privacy.

In compiling TC records in this format, the Department may need to withhold information on employees' rank where this information, when combined with other publicly available information, could disclose the identity of individuals.

With respect to race and gender, please note that employees have a choice whether to provide this information to the Department and what to report.

Finally, we note that the TC records provided to you do not include the specific dates for which employees asked for TC. The Supervisor of Records has discussed this issue with the Department and has been informed that the Department will provide you with records containing this additional information.

2. Listing of uniformed members who called in sick

You requested a listing of uniformed members who called in sick between September 1, 2008 and June 30, 2010. The Department did not disclose records in response to your request based on the employees' right to privacy.

As discussed above, records of requests for sick pay contain information about employees' health or medical condition that is highly personal. While disclosure of the information would allow the public to monitor the Department's administration of its sick pay program, the Supervisor of Records finds that the Department properly concluded that the employees' privacy interests in having the records withheld from disclosure outweighed those of the public in disclosure.

But the Department can provide sick pay records without employee names as described above, and has indicated its willingness to do so.

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3. Listing of disciplinary actions

You requested records of disciplinary actions taken against Department employees, and the race and gender of the employees, for September 1, 2008 to June 30, 2010.

Disciplinary records are part of an employee's personnel file. Public employees have a legally protected interest in their personnel files. *BRV, Inc. v. Superior Court*, 143 C.A.4th 742, 756 (2006). Disclosure of the information may constitute a violation of the employee's right to privacy. *Payton v. City of Santa Clara*, 132 C.A.3d 152 (1982) (terminated employee allowed to proceed with lawsuit against city for damages suffered when the city posted information about his termination in area accessible to staff). The courts have recognized that the public's right to disciplinary records outweighs an employee's privacy rights in some circumstances. See, for example, *BRV, Inc., supra*, 143 C.A.4th at 757-759 (finding disclosure of personnel records warranted where high-level public official, a school superintendent, had been investigated by school board because of public allegations of wrongdoing and school board thereafter agreed to buy out the official's employment agreement).

The Sunshine Ordinance recognizes the necessity of balancing the employee's privacy interest in disciplinary actions and the public interest in monitoring government operations. As noted above, Section 67.24(c)(7) of the Sunshine Ordinance lists categories of wrongdoing that warrant disclosure in cases of confirmed misconduct: personal dishonesty; misappropriation of public funds, resources or benefits; unlawful discrimination against another on the basis of status; abuse of authority; and violence.

The Department provided the disciplinary records of some employees but redacted a large portion of the records with respect to others. The Supervisor of Records will need to review the redacted information in order to determine whether the redactions were proper.

With respect to your request for race and gender of employees who have been disciplined, for the reasons discussed above, the Department properly withheld this information with respect to the employees whose disciplinary records were provided to you.

Finally, please note that the Department has informed the Supervisor of Records that it will provide additional records for the specific disciplinary matters already disclosed to you. These additional records are letters of reprimand or suspension orders actually issued.

Conclusion

The Supervisor of Records has not made a determination on the part of your petition seeking review of the Department's withholding of some disciplinary actions. The Supervisor of Records will review the redacted information and thereafter issue a determination.

As to the remainder of your petition, for the reasons set forth above and in light of the additional records that the Department will make available to you, the Supervisor of Records denies your petition.

The additional records that the Department will make available to you, if you are interested in obtaining them, are records of TC requests showing days granted and denied, including dates and the employee's race and gender, but without employee names; sick pay records but without employee names; and letters of reprimand or suspension orders for the disciplinary matters that the Department has disclosed to you.

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Please call Rhab Boughn to arrange to obtain these records.

P.J.

cc: Rhab Boughn



DENNIS J. HERRERA
City Attorney

ADINE VARAH
Deputy City Attorney
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E-MAIL: adine.varah@sfgov.org

October 6, 2010

VIA E-MAIL
Edward Campbell

Re: Petition to Supervisor of Records – San Francisco Fire Department

Dear Mr. Campbell:

On August 13, 2010, the Supervisor of Records sent you a written determination regarding the response of the San Francisco Fire Department ("Department") to your public records request seeking various records of the Department relating to employee time-off and discipline (copy attached).

As you know, the August 13, 2010 determination was partial because it did not reach one category of records, specifically, disciplinary actions taken against members of the Department during the time period of September 1, 2008 to June 30, 2010, listing specific charges and the resulting disciplinary action.

The Department had provided some disciplinary records, but withheld others on the ground that they constituted personnel information and were therefore exempt from disclosure based on the employees' right to privacy. The Supervisor of Records informed you that it would be necessary to review the withheld records in order to make a determination.


I am writing as the Supervisor of Records regarding the remaining issue relating to your petition, the validity of the Department's response to your request for records of disciplinary actions.

The Supervisor of Records has determined that the Department properly withheld the disciplinary records at issue based on a finding that the employees' right to privacy outweighs the public interest in monitoring government operations. We note, in addition, that a number of the disciplinary matters withheld involved investigations that resulted in a finding that the charge was without merit or was not sustained. (For a summary of the law governing this matter involving disclosure of personnel records, please see the August 13, 2010 letter.)

Accordingly, the Supervisor of Records has determined that the Department properly withheld the disciplinary records that you requested. This communication is the final determination on the issues raised in your petition.

Very truly yours,

DENNIS J. HERRERA
City Attorney


Adine Varah
Deputy City Attorney

cc: Rhab Boughn, San Francisco Fire Department