

Date: July 26, 2011

Item No. 3
File No. 11014

SUNSHINE ORDINANCE TASK FORCE

AGENDA PACKET CONTENTS LIST*

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

Date: July 21, 2011

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

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

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

**SUNSHINE ORDINANCE
TASK FORCE**



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ORDER OF DETERMINATION

June 7, 2011

DATE THE DECISION ISSUED

May 18, 2011

PATRICK MONETTE-SHAW V ETHICS COMMISSION (CASE NO. 11014)

FACTS OF THE CASE

Complainant Patrick Monette-Shaw alleges that the San Francisco Ethics Commission ("Ethics Commission" or "Ethics") violated the Ordinance by failing to provide records in response to his February 6, 2011, Immediate Disclosure Request ("IDR") for the following:

- The Ethics Commission investigative file(s) regarding the Laguna Honda Hospital patient gift fund complaint.
- Any closing memo(s) authored by Ethics Commission staff regarding the patient gift fund complaint.

COMPLAINT FILED

On March 6, 2011, Complainant filed a complaint with the Task Force alleging a violation of Sunshine Ordinance Sections 67.24, 67.26 and 67.34.

HEARING ON THE COMPLAINT

On May 18, 2011, Mr. Monette-Shaw presented his case to the Task Force. Garrett Chatfield represented the Ethics Commission.

Mr. Monette-Shaw argued that California Government Code Section 6254(f) permits withholding of investigation files only for state or local agencies that have correctional law enforcement or licensing requirements, which Ethics does not have. Ethics, he said, is just another agency as far as CPRA is concerned and San Francisco Charter Appendix C3.699-13 applies only to Ethics laws and not to public records access laws.

Mr. Monette-Shaw further argued that:

- Sunshine Ordinance Section 67.24(g) states City agencies and officials may not assert CPRA Section 6255 or any similar provision as the basis for withholding.
- Sunshine Ordinance Section 67.24(h) prohibits the use of "deliberative process" exemption of CPRA as an exception for withholding.
- Sunshine Ordinance Section 67.24(i) prohibits claiming exemption for withholding based on whether the public interest in withholding outweighs the public interest in disclosure.

He further argued that invocation of the "interest of justice" exemption has been ruled by the

California Supreme Court to be the same as the public interest balancing test, which is prohibited by the Sunshine Ordinance. He said Section 67.24(i) eliminates that test as an exemption. Therefore, he argued, Evidence Code 1040 does not provide a basis for withholding. And since CPRA does not exempt Ethics investigations, whatever Ethics claims is in the Charter is moot and should be ruled irrelevant by the Task Force.

Mr. Chatfield, an investigator with the Ethics Commission, told the Task Force that Mr. Monette-Shaw requested investigative files regarding a complaint and any closing memo authored by Ethics regarding the complaint. Under the San Francisco City Charter, he said, Ethics must conduct its investigation in a confidential manner. He said the Charter says the records of any investigation shall be considered confidential to the extent permitted by state law. Mr. Chatfield said the Charter also says records means all documents gathered by and generated by Ethics in the course of the investigation.

Mr. Chatfield further argued that the Charter preempts local ordinances and must therefore take precedence over the Sunshine Ordinance regarding the disclosure of public records. CPRA Sections 6276 and 6276.32, he said, provide that the documents that constitute official information are exempt from disclosure as public records. Here, the CPRA refers to Evidence Code 1040, which defines as subject to withholding "official information" that was acquired in confidence by a public employee in the course of his or her duty, where the information was not disclosed to the public prior to the time the claim of privilege is made. Mr. Chatfield said that with the exception of Task Force referrals, complaints received by Ethics are official information. He said they are gathered in confidence by members of the public or employees and have not been disclosed to the public prior to our gathering of information.

Mr. Chatfield argued that this exemption applies to all of Ethics' investigations and not only to whistleblower complaints. Mr. Chatfield said the disclosure of an investigation record is against the public's interest because there is a strong interest in encouraging employees and members of the public to come forward with complaints of violations of law within our jurisdiction. If Ethics cannot protect the identity or information provided by complainants, they are less likely to come forward, he said.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In refusing to release the requested information, the Ethics Commission relied on the "official information" exemption codified in California Evidence Code Section 1040. That provision of the California Evidence Code requires, at Section 1040(b), that agencies apply a balancing test to determine if disclosure of the information would be against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure. However, Ethics testified that it does not apply the required public-interest balancing test on a case-by-case basis. As a result, it must be the case that Ethics did not apply the required balancing test in the instance of the records sought by Mr. Monette-Shaw. It is therefore not entitled to withhold information based on that exemption and, lacking any other valid exemption under law, must produce records—redacted if necessary—in response to Mr. Monette-Shaw's requests.

Based on the evidence presented, the Task Force finds that Ethics must release the information with any appropriate redactions and must keep withholding to a minimum.

DECISION AND ORDER OF DETERMINATION

The Task Force finds that the agency violated California Public Records Act Section 6253 *et seq.* and Sunshine Ordinance Section 67.26. The agency shall release the records requested within 5 business days of the issuance of this Order and shall appear before the Compliance and Amendments Committee on June 14, 2011.

This Order of Determination regarding the CPRA violation was adopted by the Sunshine Ordinance Task Force on May 18, 2011, by the following vote: (Snyder/Wolfe)

Ayes: Snyder, Manneh, Washburn, Wolfe, Johnson, Knee

Noes: None

Recused: Cauthen

Excused: Knoebber, Costa, Chan

Absent: West.

This Order of Determination regarding the Sunshine Ordinance violation was adopted by the Sunshine Ordinance Task Force on May 18, 2011, by the following vote:

(Johnson/Washburn)

Ayes: Manneh, Washburn, Wolfe, Johnson

Noes: Snyder, Knee

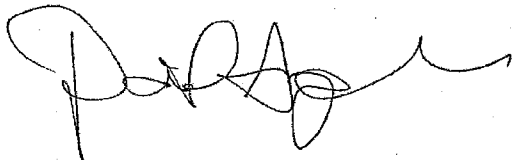
Recused: Cauthen

Excused: Knoebber, Costa, Chan

Absent: 1 - West.



Richard A. Knee, Chair
Sunshine Ordinance Task Force



David Snyder, Esq., Member, Seat #1*
Sunshine Ordinance Task Force

- c: Patrick Monette-Shaw, Complainant
- Garrett Chatfield, Respondent
- Jerry Threet, Deputy City Attorney

*Sunshine Ordinance Task Force Seat #1 is a voting seat held by an attorney specializing in sunshine law.