Date: Sept. 22, 2009

Item No. 4 & 5
File No. 09055

SUNSHINE ORDINANCE TASK FORCE

AGENDA PACKET CONTENTS LIST*

☒	**Peter Warfield against the Library Commission**
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Completed by: Chris Rustom **Date:** Sept. 16, 2009

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

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

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

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<complaints@sfgov.org>
09/09/2009 02:33 PM

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

Submitted on: 9/9/2009 2:33:47 PM

Department: Public Library

Contacted:

Public_Records_Violation: Yes

Public_Meeting_Violation: No

Meeting_Date:

Section(s)_Violated:

Description: We requested information from the Library about Park Branch library's planned renovation that included correspondence, and received a copy of email with these problems:
1. Contact information for the sender, such as the email address of the sender, was blacked out (redacted).
2. There was no explanation of what the reason was, as required by the Sunshine ordinance.
The Library has done this in a number of instances.

We ask that you provide us with an Order of Determination that orders the Library to provide letters, emails, and other communications without redaction of contact information such as sender's email address, and an Order that finds at least violations of the following sections in doing so:
A. 67.21(a) (b), Process for Gaining access to Public Records;
B. 67.26, Withholding Kept to a Minimum;
C. 67.27, Justification of Withholding

Hearing: Yes

Pre-Hearing: No

Date: 9/9/2009

Name: Peter Warfield

Address: PO Box 170544

City: San Francisco

Zip: CA 94117

Phone: 753-2180

Email:

Anonymous:

Confidentiality_Requested: No

Library Users Association

P.O. Box 170544, San Francisco, CA 94117-0544
Tel./Fax (415) 753-2180

September 8, 2009

Honorable Members
Sunshine Ordinance Task Force
City Hall, San Francisco

Subject: ***Complaint: Library Redaction of Contact Information***

Ladies and Gentlemen:

We request a hearing on this matter as soon as possible.

What is This Complaint About?

We requested information from the Library about Park Branch library's planned renovation that included correspondence, and received a copy of email with these problems:

1. Contact information for the sender, such as the email address of the sender, was blacked out (redacted).

2. There was no explanation of what the reason was, as required by the Sunshine ordinance.

The Library has done this in a number of instances.

What We Ask For

We ask that you provide us with an Order of Determination that orders the Library to provide letters, emails, and other communications without redaction of contact information such as sender's email address, and an Order that finds at least violations of the following sections in doing so:

A. 67.21(a) (b), Process for Gaining access to Public Records;

B. 67.26, Withholding Kept to a Minimum;

C. 67.27, Justification of Withholding

Thank you for your attention to this.

Sincerely yours,

Peter Warfield
Executive Director

San Francisco Public Library
100 Larkin Street, San Francisco, CA 94102

Honorable Members, Sunshine Ordinance Task Force
c/o Chris Rustom
Office of the Clerk, Board of Supervisors
City Hall, Room 244
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102-4689

September 16, 2009

Re: Complaint #09055 Peter Warfield v. San Francisco Public Library

Dear Task Force Members:

This letter responds to Peter Warfield's complaint filed on September 9, 2009, against the San Francisco Public Library. The Library received a copy of the complaint on September 9, 2009.

Before addressing the specifics of this complaint, we must address a gap in Warfield's complaint. First, Warfield fails to identify the public records request that is the genesis of his complaint. Nor does he specify the date on which the alleged public records violation occurred. Instead, Warfield makes a general claim that he requested information about the Park Branch library's planned renovation, and that the Library redacted contact information of senders, including email addresses, from the records it provided to him. Warfield routinely submits numerous public records requests to the Library, and in turn he receives numerous responses to his requests from the Library. Therefore, we have no way of addressing Warfield's allegation with any specificity.

Second, because Mr. Warfield's complaint does not identify any particular public records request, it is impossible to respond to his allegation that the Library did not provide an explanation of the basis for a redaction. The Library's standard practice in responding to public records request is to provide an explanation for why any information was redacted.

Redaction of Home Addresses and Home Phone Numbers

Where the contact information for the sender is a home address and/or home phone number, the Library redacts such information. If the sender lists a business or organizational address and/or phone number, the Library does not redact such information.

The Library does not release home phone numbers and home addresses of individuals in order to protect their right to privacy. Both state law and local law recognize and protect personal privacy. *See* Cal. Govt. Code § 6250 (stating that in enacting the Public Records Act, the Legislature is "mindful of the right of individuals to privacy"); Cal. Govt. Code § 6254(c) (exempting from disclosure "personnel, medical or similar files, the disclosure of which would constitute an unwarranted invasion of

personal privacy"); Cal. Govt. Code § 6254(k) (exempting from disclosure "[r]ecords, the disclosure of which is exempted or prohibited pursuant to state or federal law"); Cal. Const. Art. I, § 1 (including in the declaration of inalienable rights the right to privacy); S.F. Admin. Code § 67.1(g) (stating that individuals in San Francisco "have rights to privacy that must be respected"); S.F. Admin. Code Chapter 12M (prohibiting disclosure of personal information except under certain circumstances). We note by way of example that the Task Force's own website lists "home telephone numbers" as an example of information that is exempt from disclosure under the Public Records Act and the Sunshine Ordinance.[1]

People have a right to privacy in their homes. In accordance with the law, the Library respects their right to privacy by not disclosing home addresses or home phone numbers.

Redaction of Personal Email Addresses

In general, personal email addresses are private and confidential. Consistent with the City Attorney Opinion dated May 15, 2007, on a similar issue, the Library does not disclose personal email addresses. (*See attached City Attorney Opinion Re Confidentiality of Commissioners' Personal Email Addresses* (May 15, 2007)). The City Attorney Opinion finds that the personal email addresses of City Commissioners should not be disclosed to the public in order to protect the Commissioners' privacy rights. The privacy rights at stake here are arguably even greater, because the individuals whose privacy rights would be violated by disclosure of their email addresses are purely private citizens.

The Sunshine Ordinance acknowledges that "[p]rivate entities and *individuals* and employees and officials of the City and County of San Francisco have rights to privacy that must be respected." (S.F. Admin. Code §67.1(g) (emphasis added).) This provision was added to the Ordinance with the passage of Proposition G in November 1999. It indicates that the voters understood that Proposition G's enhanced open government system was not intended to come at the expense of the personal privacy of individuals.

In November 2006, with the passage of Proposition D, San Francisco's voters again emphasized that protection of personal privacy was a high priority of the City. (S.F. Admin. Code Chapter 12M.) This measure prohibits the City from disclosing private information "unless specifically authorized to do so by the subject individual or by Contract or where required by Federal or State law or judicial order." (*Id.*, §12M.2(a).) The ordinance defines "private information" as "*any* information that ... could be used to identify an individual, including *without limitation,* name, *address,* social security number, medical information, financial information, date and location of birth, and names of relative ..." (*Id.*, §12M.1(e) (emphasis added).)

While Propositions G and D do not directly say whether the City may disclose a sender's personal e-mail address without authorization, these laws highlight that the City, like the State, places great importance on protecting personal privacy while

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[1] The Task Force website states: "Under the California Public Records Act and the San Francisco Sunshine Ordinance, some records are exempt from disclosure. Examples of records that do not have to be disclosed are: Personnel records, Medical records, *Home telephone numbers* ...." Frequently Asked Questions, *available at* http://www.sfgov.org/site/sunshine_index.asp?id=4418 (emphasis added).

maintaining our expansive system of open government. In light of these voter mandates, the Library takes seriously its obligation to maintain the privacy of personal email addresses.

Courts have recognized that an individual has a significant privacy interest in his or her personal e-mail address. Personal e-mail is most often used in the home, an enclave of privacy that courts have specially protected. "[T]he privacy of the home ... is accorded special consideration in our Constitution, laws, and traditions." (*U.S. Dept. of Defense v. Federal Labor Relations Authority* (1994) 510 U.S. 487, 501.) The Supreme Court has repeatedly noted that:

> One important aspect of residential privacy is protection of the unwilling listener. Although in many locations, we expect individuals simply to avoid speech they do not want to hear, the home is different. That we are often 'captives' outside the sanctuary of the home and subject to objectionable speech does not mean we must be captives everywhere. Instead, a special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions. Thus, we have repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom

(*Frisby v. Schultz* (1988) 487 U.S. 474, 484-85 (citations and internal quotation marks omitted).)

Yet anyone aware of a person's e-mail address can become an uninvited and unwanted electronic visitor into that person's home. Disclosure of a personal e-mail address can intrude upon the privacy of the home in numerous ways. For example:

- Disclosure can result in unwanted commercial solicitations.
- The content of unsolicited e-mails can be harassing, offensive, abusive, and even threatening to the recipient.
- The intrusion caused by unwanted e-mail can be immediate – it can appear instantaneously on the user's computer screen in a manner that is in some ways more intrusive than a stack of unsolicited mail lying in one's postal mailbox.
- The volume of electronic communications that may be generated by public disclosure of a personal e-mail address may create added burdens for the personal computer user who may be forced to employ filters or virus protection.

For these reasons, a city's disclosure of personal e-mail addresses may intrude upon one's privacy interest in the home and what Justice Brandeis described simply as the "right to be let alone." (*Olmstead v. United States* (1928) 277 U.S. 438, 478 (Brandeis, J., dissenting).)

This is not to suggest that the "right to be let alone" is limited to the home, or that there is no right of privacy in personal email addresses when a personal computer or similar device is used outside the home. One's personal space does not disappear the moment he or she exits the home. For example, an individual on vacation who checks his or her laptop for messages, should not have to wade through unsolicited and unwanted messages from strangers who have obtained their email address from the City through a public records request.

Numerous courts have recognized that the important privacy interest in a personal e-mail address warrants its redaction or other confidential treatment. *See, e.g., Preminger v. Nicholson* (N.D. Cal. 2007) 2007 WL 735711, Slip Copy at 5 (sealing of voter registration forms because they contain personal information including e-mail addresses); *Bitte v. United Companies Lending Corp.* (E.D. La. 2006) 2006 WL 3692754, Slip Copy at 2 (redacting plaintiff's personal e-mail address from court transcript and instructing defendants' counsel not to disclose it to defendants or use it for non-litigation purposes); *Asis Internet Services v. Optin Global, Inc.* (N.D. Cal. 2006) 2006 WL 2792436, Slip Copy at 6, n.3 (redacting personal e-mail addresses from trial exhibits); *Montgomery County Hosp. Dist. v. Smith* (Tex.App. 2005) 181 S.W.3d 844, 846 (deleting e-mail address from text of e-mail quoted in court opinion); *In Re Enron Corporation Securities and Derivative and "ERISA" Litigation* (S.D. Tex. 2003) 2003 WL 22218315, Slip Copy at 4 (disclosing personal e-mail addresses of outside directors of embattled corporation to plaintiffs but under confidentiality order); *McConnell v. Federal Elections Commission* (D.D.C. 2003) 251 F. Supp. 2d 919, 947 (permitting redaction of e-mail addresses in documents ordered to be disclosed). These decisions reflect a common judicial understanding that there is a significant privacy interest in one's personal e-mail address, and that government should not lightly disclose such information.[2]

In *Stolt-Nielsen Transportation Group Ltd. v. United States* 408 F.Supp.2d 166 (2007)(*reversed and remanded on appeal on separate grounds)* the Court stated:

> Exemption (b)(6) provides that "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy" may be exempted from disclosure under FOIA. 5 U.S.C. §552(b)(6). The Supreme Court has interpreted "similar files" to include all information "on an individual which can be identified as applying to that individual." *Dep't of State v. Washington Post Co.*, 456 U.S. 595, 602 (1982) (*quoting* H.R. Rep. No. 89-1497 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2418). To properly invoke Exemption (b)(6), the agency must show that the information applies to a particular individual and is personal in nature. *N.Y. Times Co. v. NASA*, 852 F.2d 602, 606 (D.C. Cir. 1988).
>
> This exemption requires that the Court strike a proper balance between the protection of an individual's right to privacy and the preservation of the public's right to Government information.... The analysis of the "public interest" focuses on the purpose for which FOIA was enacted, that is, to "shed[ ] light on an

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[2] One California appellate court, in an unpublished opinion that is not binding precedent, has addressed the issue of disclosure of personal e-mail addresses. (*Holman v. Superior Court* (2003) 2003 WL 21509055.) The case did not involve personal e-mail addresses of public officials or employees. On the particular and somewhat unusual facts of the case, the Court was persuaded that the public interest would be furthered by disclosure of the addresses.

There are a couple of cases in which a court has permitted disclosure of personal e-mail addresses during pretrial discovery or investigation without it being apparent that the information must be treated confidentially. (*ACS Consultant Company, Inc. v. Williams* (E.D.Mich. 2007) 2007 WL 674608, Slip Copy at 8-9 (upholding narrowly drawn subpoena); *G.D. v. Monarch Plastic Surgery, P.A.* (D.Kan. 2007), Slip Copy at 13-14 (upholding interrogatory directed to plaintiffs for their personal e-mail addresses; court notes the relevancy of the information in context and also notes plaintiffs' failure to seek a protective order).) But the strongly dominant theme of the cases bearing on disclosure of personal e-mail addresses during discovery or at trial is for the court to redact the addresses or order that they be treated in a confidential manner.

> agency's performance of its statutory duties." *DOJ v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989). Accordingly, if a document invades a third party's privacy but does not contain "official information" shedding light on government functions, it may be withheld under Exemption (b)(6). *Id.* at 774.
>
> In this case, defendant invokes Exemption (b)(6) to withhold phone numbers and e-mail addresses.... As defendant correctly notes, this information is clearly personnel information, medical information, or information that can "be identified as applying to [a particular] individual," *Washington Post Co.*, 456 U.S. at 602, and therefore satisfies the threshold requirement for withholding under FOIA Exemption (b)(6). Plaintiff has not demonstrated any legitimate public interest in the release of this personnel information, and, therefore, this information was properly withheld pursuant to Exemption (b)(6). *See, e.g., Judicial Watch, Inc. v. Dep't of Commerce,* 83 F.Supp.2d 105, 112 (D.D.C. 1999) (finding similar biographical data to be the type of information protected by Exemption (b)(6)).

Id.; see also Knight v. NASA (E.D. Ca. 2006) 2006 WL 3780901, Slip Copy at 5-6 (upholding agency's redaction of personal e-mail addresses in response to records request under FOIA privacy exemption).) Significantly, FOIA's Exemption 6(b) is virtually identical to Section 6254(c) of the Public Records Act, which protects from disclosure "[p]ersonnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy." (Cal. Gov. Code §6254(c).) California courts may, and frequently do, consult FOIA case law to ascertain the meaning and application of analogous provisions of the Public Records Act. (*Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325, 1338.)

There is no reasonable justification under applicable public records laws for requiring the Library to disclose a sender's personal e-mail address. A sender does not generally waive his or her privacy rights upon sending a personal email address to the City, or consent to public disclosure of the personal e-mail address by disclosing it to the City.

Access to public records is central to the healthy functioning of democratic government. (Cal. Gov. Code §6250; S.F. Admin. Code §67.1.) Courts frequently recognize that public records laws serve the critical function of providing information to the public about the workings of government, which makes it possible for the public to monitor government. (*Rackauckas v. Superior Court* (2002) 104 Cal.App.4th 169, 173.) But there is no legal basis to conclude that the City is required or permitted to provide an individual's personal e-mail address to a member of the public absent consent.

For these reasons, Mr. Warfield's complaint is without merit and the Library respectfully requests that the Task Force dismiss the complaint.

Sincerely,

Sue Blackman
Custodian of Records/Library Commission Secretary

Attachments:
City Attorney Opinion Re Confidentiality of Commissioners' Personal Email Addresses (May 15, 2007)

CITY AND COUNTY OF SAN FRANCISCO

DENNIS J. HERRERA
City Attorney

OFFICE OF THE CITY ATTORNEY

PAUL ZAREFSKY
Deputy City Attorney

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

May 15, 2007

Honorable Members
Sunshine Ordinance Task Force
c/o Frank Darby, Jr., Administrator
Office of the Clerk, Board of Supervisors
Room 244, City Hall
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102

Re: Confidentiality of Commissioners' Personal E-Mail Addresses

Dear Honorable Task Force Members:

We understand that the question of compelled disclosure of a commissioner's personal e-mail address is before the Task Force in a case involving the Small Business Commission. The issue is of importance to City officials and employees generally and to citizens who serve on advisory bodies. The issue appears to be a recurring one.

This Office has consistently advised that personal e-mail addresses of members of boards, commissions, task forces, and other City bodies should not be disclosed to the public without the consent of the person whose e-mail address is being sought. In reliance on that oral advice, such bodies, including the Small Business Commission, have refused to disclose a commissioner's personal e-mail address in response to a public records request. We submit this letter for the purpose of sharing our legal analysis with the Task Force. We hope that the Task Force will find this letter useful in its analysis of the issue.

We understand that it is important that members of the public have one or more avenues for communicating with public officials. In the case of commissioners, written communications from the public, whether in electronic or paper form, may be channeled through the commission secretary or other appropriate staff of the department the commission oversees. Further, members of the public have a right to communicate face-to-face with commissioners during public meetings. (Cal. Gov. Code §54954.3; S.F. Admin. Code §67.15.) But no law gives a member of the public the right to discover a commissioner's personal e-mail address or communicate with a commissioner by e-mailing the commissioner at that address.

The Public Records Act, Sunshine Ordinance, and California Constitution all recognize the importance of personal privacy. (Cal. Gov. Code §6254(c); S.F. Admin. Code §67.1(g); Cal. Const. Art. I, §1). The Sunshine Ordinance acknowledges that "[p]rivate 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." (S.F. Admin. Code §67.1(g) (emphasis added).) This provision was added to the Ordinance with the passage of Proposition G in November 1999. It indicates that the voters understood that Proposition G's enhanced open government system was not intended to come at the expense of the personal privacy of individuals, including City officials such as commissioners.

In November 2006, with the passage of Proposition D, San Francisco's voters again emphasized that protection of personal privacy was a high priority of the City. (S.F. Admin. Code Chapter 12M.) This measure, which to a large extent restated existing law, prohibits the City from disclosing private information "unless specifically authorized to do so by the subject individual or by Contract or where required by Federal or State law or judicial order." (*Id.*, §12M.2(a).) The ordinance defines "private information" as "*any* information that ... could be used to identify an individual, including *without limitation*, name, *address*, social security number, medical information, financial information, date and location of birth, and names of relative ..." (*Id.*, §12M.1(e) (emphasis added).)

While Propositions G and D do not directly say whether the City may disclose a commissioner's personal e-mail address without authorization, these laws highlight that the City, like the State, places great importance on protecting personal privacy while maintaining our expansive system of open government. Accordingly, the City should act with great caution before disclosing a commissioner's personal e-mail address.

An individual has a significant privacy interest in his or her personal e-mail address. Personal e-mail is most often used in the home, an enclave of privacy that courts have specially protected. "[T]he privacy of the home ... is accorded special consideration in our Constitution, laws, and traditions." (*U.S. Dept. of Defense v. Federal Labor Relations Authority* (1994) 510 U.S. 487, 501.) The Supreme Court has repeatedly noted that "[o]ne important aspect of residential privacy is protection of the unwilling listener. Although in many locations, we expect individuals simply to avoid speech they do not want to hear, the home is different. That we are often 'captives' outside the sanctuary of the home and subject to objectionable speech does not mean we must be captives everywhere. Instead, a special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions. Thus, we have repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom." (*Frisby v. Schultz* (1988) 487 U.S. 474, 484-85 (citations and internal quotation marks omitted).)

Yet anyone aware of a person's e-mail address can become an uninvited and unwanted electronic visitor into that person's home. Disclosure of a personal e-mail address can intrude upon the privacy of the home in numerous ways. For example:

- Disclosure can result in unwanted commercial solicitations.
- The content of unsolicited e-mails can be harassing, offensive, abusive, and even threatening to the recipient.
- The intrusion caused by unwanted e-mail can be immediate – it can appear instantaneously on the user's computer screen in a manner that is in some ways more intrusive than a stack of unsolicited mail lying in one's postal mailbox.
- The volume of electronic communications that may be generated by public disclosure of a personal e-mail address may create added burdens for the personal computer user who may be forced to employ filters or virus protection.

For these reasons, a city's disclosure of personal e-mail addresses may intrude upon one's privacy interest in the home and what Justice Brandeis described simply as the "right to be let alone." (*Olmstead v. United States* (1928) 277 U.S. 438, 478 (Brandeis, J., dissenting).)

This is not to suggest that the "right to be let alone" is limited to the home, or that there is no right of privacy in personal e-mail addresses when a personal computer or similar electronic device is used outside the home. One's personal space does not disappear the moment he or she exits the home, although in certain respects it is diminished. But if a commissioner on vacation

checks his or her laptop for messages, the commissioner should not have to wade through unsolicited and unwanted messages from members of the public.

Further, in the case of personal e-mail addresses, the privacy interest at stake is not merely the interest every individual has in seclusion. There is also a privacy interest in the security of one's personal e-mail address. A technologically savvy person who knows another person's e-mail address could send an e-mail using that address, essentially impersonating the individual whose e-mail address is being used. Neither the Public Records Act nor the Sunshine Ordinance should be interpreted in a manner that facilitates this form of identity theft.

Unauthorized disclosure of a commissioner's personal e-mail address to a member of the public has ramifications beyond the specific person to whom the e-mail address is immediately disclosed. The City cannot provide that information to some members of the public but not others. If the City gives a requester a copy of a record that does not redact a personal e-mail address, any subsequent requester would have a right to obtain that address.[1] (Cal. Gov. Code §6254.5.) Whether a requester is high-minded or vindictive, responsible or obsessive, courteous or abusive, is irrelevant. Whether providing the information will serve some useful purpose is also irrelevant, because the City is not generally allowed to inquire into a requester's purpose in seeking a record. (*Id.*, §6257.5; S.F. Admin. Code §67.25(c).) In addition, upon receipt of a personal e-mail address, a requester would of course be free to disseminate it to anyone else – who could in turn disseminate it to others.

Thus, once a commissioner's personal e-mail address is disclosed, there is no limit as to who may ultimately obtain it or the use to which it may be put by one who gains access to it. Any desire a commissioner might have to maintain the confidentiality of his or her personal e-mail address would be defeated by such disclosures. The price a commissioner would pay for public service would include surrendering this part of his or her privacy to the public at large.

Numerous courts have recognized that the important privacy interest in a personal e-mail address warrants its redaction or other confidential treatment. *See, e.g., Preminger v. Nicholson* (N.D.Cal. 2007) 2007 WL 735711, Slip Copy at 5 (sealing of voter registration forms because they contain personal information including e-mail addresses); *Bitte v. United Companies Lending Corp.* (E.D. La. 2006) 2006 WL 3692754, Slip Copy at 2 (redacting plaintiff's personal e-mail address from court transcript and instructing defendants' counsel not to disclose it to defendants or use it for nonlitigation purposes); *Asis Internet Services v. Optin Global, Inc.* (N.D. Cal. 2006) 2006 WL 2792436, Slip Copy at 6, n.3 (redacting personal e-mail addresses from trial exhibits); *Montgomery County Hosp. Dist. v. Smith* (Tex.App. 2005) 181 S.W.3d 844, 846 (deleting e-mail address from text of e-mail quoted in court opinion); *In Re Enron Corporation Securities and Derivative and "ERISA" Litigation* (S.D. Tex. 2003) 2003 WL 22218315, Slip Copy at 4 (disclosing personal e-mail addresses of outside directors of embattled corporation to plaintiffs but under confidentiality order); *McConnell v. Federal Elections Commission* (D.D.C. 2003) 251 F. Supp. 2d 919, 947 (permitting redaction of e-mail addresses in documents ordered to be disclosed). These decisions are not in any sense binding on California courts. But they reflect a common judicial understanding that there is a significant privacy interest in one's personal e-mail address, and that government should not lightly disclose such information.[2]

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[1] This analysis applies to a prior lawful disclosure of a personal e-mail address. If the City has erroneously disclosed information encompassed within a third party's right of privacy, it should not compound that error by continuing to disclose the private information.

[2] One California appellate court, in an unpublished opinion that is not binding precedent, has addressed the issue of disclosure of personal e-mail addresses. (*Holman v. Superior Court* (2003) 2003 WL 21509055.) The case did not involve personal e-mail addresses of public

A recent federal Freedom of Information Act ("FOIA") case, decided March 28, 2007, is instructive on the issue of the confidentiality of personal e-mail addresses in general. Accordingly, we quote the opinion at length. In *Stolt-Nielsen Transportation Group Ltd. v. United States* (D.D.C. 2007), --- F.Supp.2d ---, 2007 WL 942073, the Court stated:

> Exemption (b)(6) provides that "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy" may be exempted from disclosure under FOIA. 5 U.S.C. §552(b)(6). The Supreme Court has interpreted "similar files" to include all information "on an individual which can be identified as applying to that individual." *Dep't of State v. Washington Post Co.*, 456 U.S. 595, 602 (1982) (*quoting* H.R.Rep. No. 89-1497 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2418). To properly invoke Exemption (b)(6), the agency must show that the information applies to a particular individual and is personal in nature. *N.Y.Times Co. v. NASA*, 852 F.2d 602, 606 (D.C.Cir. 1988).
>
> This exemption requires that the Court strike a proper balance between the protection of an individual's right to privacy and the preservation of the public's right to Government information.... The analysis of the "public interest" focuses on the purpose for which FOIA was enacted, that is, to "shed[ ] light on an agency's performance of its statutory duties." *DOJ v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989). Accordingly, if a document invades a third party's privacy but does not contain "official information" shedding light on government functions, it may be withheld under Exemption (b)(6). *Id.* at 774.
>
> In this case, defendant invokes Exemption (b)(6) to withhold phone numbers and e-mail addresses.... As defendant correctly notes, this information is clearly personnel information, medical information, or information that can "be identified as applying to [a particular] individual," *Wasington Post Co.*, 456 U.S. at 602, and therefore satisfies the threshold requirement for withholding under FOIA Exemption (b)(6). Plaintiff has not demonstrated any legitimate public interest in the release of this personnel information, and, therefore, this information was properly withheld pursuant to Exemption (b)(6). *See, e.g., Judicial Watch, Inc. v. Dep't of Commerce*, 83 F.Supp.2d 105, 112 (D.D.C. 1999) (finding similar biographical data to be the type of information protected by Exemption (b)(6)).

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officials or employees. On the particular and somewhat unusual facts of the case, the Court was persuaded that the public interest would be furthered by disclosure of the addresses.

We have located a couple of cases in which a court has permitted disclosure of personal e-mail addresses during pretrial discovery or investigation without it being apparent that the information must be treated confidentially. (*ACS Consultant Company, Inc. v. Williams* (E.D.Mich. 2007) 2007 WL 674608, Slip Copy at 8-9 (upholding narrowly drawn subpoena); *G.D. v. Monarch Plastic Surgery, P.A.* (D.Kan. 2007), Slip Copy at 13-14 (upholding interrogatory directed to plaintiffs for their personal e-mail addresses; court notes the relevancy of the information in context and also notes plaintiffs' failure to seek a protective order).) But the strongly dominant theme of the cases we have found bearing on disclosure of personal e-mail addresses during discovery or at trial is for the court to redact the addresses or order that they be treated in a confidential manner.

(2007 WL 942073, Slip Copy at 14-15 (some quotation marks and citations omitted); *see also Knight v. NASA* (E.D. Ca. 2006) 2006 WL 3780901, Slip Copy at 5-6 (upholding agency's redaction of personal e-mail addresses in response to records request under FOIA privacy exemption).) Significantly, FOIA's Exemption 6(b) is virtually identical to Section 6254(c) of the Public Records Act, which protects from disclosure "[p]ersonnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy." (Cal. Gov. Code §6254(c).) California courts may, and frequently do, consult FOIA case law to ascertain the meaning and application of analogous provisions of the Public Records Act. (*Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325, 1338.)

We can think of no reasonable justification under applicable public records laws for requiring disclosure of a commissioner's personal e-mail address. A commissioner does not generally waive his or her privacy rights upon assuming office. Nor does a commissioner expressly or impliedly consent to disclosure of his or her personal e-mail address by disclosing that address to commission staff. If the staff communicates by e-mail to the commissioner, using the personal e-mail address on file, the public does not thereby also gain the right to do so. In the first instance, the commissioner has consented to such e-mail contact; in the second, there has been no consent. If, notwithstanding this lack of consent, public disclosure of the commissioner's personal e-mail address is legally required, it would follow that a commissioner's unlisted personal phone number would have to be disclosed in response to a public records request if staff had ever used that phone number to contact the commissioner, and his or her home address would have to be disclosed to a requester if staff had ever mailed or delivered an agenda packet to that address. We think it unlikely that a court would be inclined to sanction these intrusions on a commissioner's privacy.

Access to public records is central to the healthy functioning of democratic government. (Cal. Gov. Code §6250; S.F. Admin. Code §67.1.) Courts frequently recognize that public records laws serve the critical function of providing information to the public about the workings of government, which makes it possible for the public to monitor government. (*Rackauckas v. Superior Court* (2002) 104 Cal.App.4th 169, 173.) But we know of no case that could plausibly be read to establish that a member of the public has a right under these or other laws to use a commissioner's personal e-mail address to communicate directly with a commissioner. And we know of no provision of law that establishes such a right. Members of the public may communicate with commissioners by e-mail through commission staff. Or they may communicate by e-mail directly with commissioners who voluntarily disclose their personal e-mail address. But there is no legal basis to conclude that the City is required or permitted to provide a commissioner's personal e-mail address to a member of the public absent the commissioner's authorizing disclosure of the address.

Very truly yours,

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cc: Michael Farrah
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