Date: September 23, 2008

Item No. 14
File No. 08032

SUNSHINE ORDINANCE TASK FORCE

AGENDA PACKET CONTENTS LIST*

- [x] **Order Of Determination Kimo Crossman v. CAO**
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Completed by: **Frank Darby** **Date:** **September 17, 2008**

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

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

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

SUNSHINE ORDINANCE
TASK FORCE

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ORDER OF DETERMINATION
August 4, 2008

DATE THE DECISION ISSUED
July 22, 2008

KIMO CROSSMAN v. CITY ATTORNEY'S OFFICE (08032)

FACTS OF THE CASE

On or about June 4, 2008, Kimo Crossman contacted Matt Dorsey, Public Information Officer for the City Attorney's Office ("CAO") and asked that the CAO provide Kimo Crossman with a "Word Version" of a record that he had in PDF format. The record is a September 25, 2007 letter to the Board of Supervisors and Ethics Commission from the Mayor, transmitting written charges of official misconduct "In the Matter of Charges Against Edmund Jew". Matt Dorsey responded and declined to provide the "Word Version". Matt Dorsey referred Kimo Crossman to the City Attorney's Office Website and to a particular letter that stated the CAO's position on the release of information in "Word Version".

COMPLAINT FILED

On June 6, 2008, Crossman filed a complaint with the Sunshine Ordinance Task Force ("Task Force"), alleging that the CAO violated Sections 67.21(L), 67.21-1, 67.26and 67.27 of the Sunshine Ordinance and Sections 6253(b) and 6253.9 of the State Government Code by refusing to release the record in a "Word Version".

HEARING ON THE COMPLAINT

On July 22, 2008, Complainant Kimo Crossman appeared before the Task Force and presented his Complaint. Respondent was represented by Deputy City Attorney Paul Zarefsky who presented the Department's defense.

The issue in the case is whether the Department violated Section(s) 67.21, 67.21-1, 67.26 & 67.27 of the Ordinance and Sections 6253.9 & 6253 of the California Public Records Act.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case is similar in its facts and on the law to the previously decided case of Crossman v. Clerk of the Board of Supervisors in which a document was also requested to be released in Word Format. To be consistent with our earlier decision, and as the policy and legal justifications provided by the Department are not persuasive in light of the clear legal requirements of the Ordinance and Government Code, the following decision is issued.

ORDER OF DETERMINATION

DECISION AND ORDER OF DETERMINATION

The Task Force finds that the Department violated Section(s) 67.21 (I) of the Sunshine Ordinance and 6253.9 (a) (i) & (ii) of the California Public Records Act for failure to provide a copy of the requested document in Word format as requested. The Department shall release the record in Word format as requested within 5 business days of the issuance of this Order and appear before the Compliance and Amendments Committee on August 13, 2008.

This Order of Determination was adopted by the Sunshine Ordinance Task Force on July 22, 2009, by the following vote: (Knee / Goldman)
Ayes: Craven, Knee Washburn, Knoebber, Chu, Goldman
Noes: Pilpel
Excused: Cauthen, Gokhale, Chan, Williams

Kristin Murphy Chu, Chair
Sunshine Ordinance Task Force

c: Ernie Llorente, Deputy City Attorney
Kimo Crossman
Paul Zarefsky, Deputy City Attorney
City Attorney's Office

CITY AND COUNTY OF SAN FRANCISCO

DENNIS J. HERRERA
City Attorney

OFFICE OF THE CITY ATTORNEY

PAUL ZAREFSKY
Deputy City Attorney

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E-MAIL: paul.zarefsky@sfgov.org

RECEIVED
BOARD OF SUPERVISORS
SAN FRANCISCO
2008 AUG 11 PM 3:57

August 11, 2008

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

Re: Order of Determination – Complaint 08032 (Crossman v. City Attorney's Office)

Dear Task Force Members:

This Office is in receipt of the Order of Determination (the "Order"), dated August 4, 2008 (received August 5), pertaining to the above-entitled complaint. The Order follows the Task Force hearing of July 22, 2008 on the complaint. The Order directs this Office to release to the complainant a Word version of a record that had been supplied to the requester as a PDF document – the transmission of charges brought by the City against then-Supervisor Ed Jew pertaining to his continued service on the Board of Supervisors.

We respectfully decline to comply with the Order. As stated in my presentation at the hearing, neither the Public Records Act nor the Sunshine Ordinance requires a department to provide a Word document to a requester in Word form rather than PDF. The City Attorney's Office reached this conclusion in a legal opinion, dated September 19, 2006, that is publicly available on the City Attorney's website. A copy of the opinion is attached for your reference. Contrary to an assertion made by a speaker during public comment at the hearing and repeated by the complainant in a subsequent e-mail, the September 19, 2006 opinion constitutes an official opinion of this Office on the issue.

Without belaboring the Word versus PDF issue, three points warrant further comment in light of the July 22 hearing.

First, with respect to Section 67.21(l) of the Sunshine Ordinance: During his rebuttal at the hearing, the complainant quoted the first sentence for the proposition that the requirement of providing an electronic record "in any form requested" means that a Word document must be provided to a requester in Word form if so requested. But the complainant did not quote the first sentence in its entirety. He stopped before the end of the sentence, then used the words "blah, blah, blah" to complete it. This improvised editing of the sentence distorts its meaning. The entire sentence reads: "Inspection and copying of documentary public information stored in electronic form shall be made available to the person requesting the information in any form requested which is available to or easily generated by the department, its officers or employees, **including disk, tape, printout or monitor** at a charge no greater than the cost of the media on which it is duplicated." (Emphasis added.) The highlighted words, omitted from the complainant's recitation of this sentence, make clear that Section 67.21(l) does not impose any obligation with respect to providing an electronic record in Word (or WordPerfect, or any other

word processing program) rather than PDF. Rather, the term "in any form" means the form of electronic medium, that is, "disk, tape, printout, or monitor."

Second, with respect to Section 6253.9 of the Public Records Act: As stated at the hearing, the undersigned has reviewed all the committee reports accompanying AB 2799, the bill that added Section 6253.9 to the Act, in an effort to understand the meaning of subsection (f), which states: "Nothing in this section shall be construed to require the public agency to release an electronic record in the electronic form in which it is held by the agency **if its release would jeopardize the security or integrity of the original record** or of any proprietary software in which it is maintained." (Emphasis added.) Subsection (f) was added to AB 2799 during the legislative process. The only committee report addressing the meaning of this provision states:

> The bill would make conditional the requirement that a public agency comply with a request for public records held in an electronic format. These conditions are:
>
> . . . .
>
> 3. An agency would not be required to release an electronic record in electronic form if its release would jeopardize or compromise the security or integrity of the original record **or** of any proprietary software in which it is maintained.
>
> This limitation was added to the bill in order to alleviate concerns that electronic records, though created with taxpayer money, may have been produced using software designed specifically for the agency. This bill would give the agency the flexibility to refuse to release a requested record in electronic format, if such a release would mean that the software would also have to be released. Even without the software problem, though, an electronic record containing the data may be deciphered and the software program reconstructed ....
>
> **The agency also may refuse to provide the information in electronic format if the electronic record, when transmitted or provided to a requester, could be altered or retransmitted, thus rendering the original record vulnerable.**
>
> These **two concerns** were registered by opponents of SB 1065 last year. Thus, AB 2799 includes a provision that gives the public agency the option not to provide the information if disclosing it would jeopardize the integrity or security of the system.

(Senate Floor Analysis of AB 2799, dated August 16, 2000, at 4-5 (prepared by Senate Rules Committee; entitled "Third Reading") (emphasis added).)[1] This committee report highlights that subsection (f) was intended to address two concerns – not only protecting proprietary software, as a Task Force member suggested at the hearing, but also protecting an electronic record from alteration by a requester. We are aware of no legislative history of AB 2799 that would cast doubt on this understanding of the meaning of subsection (f). This legislative history appears to precisely address the Word versus PDF issue. A Word document can be easily "altered" and "thus render[s] the original record vulnerable."

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[1] This document may be found at www.leginfo.ca.gov (click on "Bill Information," enter AB 2799 for the 1999-2000 legislative session; under "Analyses," this record is the "Senate Floor" entry dated 8/19/2000).

Finally, the particular document the complainant requested – a Word version of charges brought by the City against then-Supervisor Ed Jew pertaining to his qualifications to serve on the Board – is a litigation document. The metadata therein are part of a confidential attorney-client communication and comprise attorney work product. We cannot imagine that the Public Records Act or Sunshine Ordinance were ever intended to require attorneys for the City to disclose privileged litigation materials, and we decline to do so in this instance.

Accordingly, for the reasons stated in this letter and in our September 19, 2006 opinion, this Office respectfully declines to comply with the Order of the Task Force. We will not be appearing at the Compliance and Amendments Committee hearing on August 13, 2008. The issue which the complaint and Order address is a purely legal issue, and this Office has repeatedly stated its views on the issue and appeared at least twice before the Task Force on the issue.

Respectfully submitted,

DENNIS J. HERRERA
City Attorney

PAUL ZAREFSKY
Deputy City Attorney

CITY AND COUNTY OF SAN FRANCISCO

DENNIS J. HERRERA
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OFFICE OF THE CITY ATTORNEY

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MEMORANDUM

TO: Honorable Members
Sunshine Ordinance Task Force

FROM: Paul Zarefsky
Deputy City Attorney

DATE: September 19, 2006

RE: Providing Electronic Records In PDF Rather Than Word Format When Responding To A Public Records Request

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This Office has orally advised City departments that, in response to a public records request for an electronic copy of a record, a City department may provide the record to the requester in PDF[1] rather than Word format. In this memorandum, we address the legal principles supporting this conclusion. The issue potentially affects all City departments, because all departments maintain electronic records. The volume of such records is huge, and we expect that the issue will arise in future public records requests for electronic records.

We address this issue from two perspectives – (1) protecting "metadata" hidden in the electronic record and (2) protecting the text of the electronic record. This memorandum does not address any complaint before the Task Force. Rather, we intend to provide general advice on this issue.

Protecting Metadata Hidden In The Electronic Record

A Word document – unlike an electronic record in PDF format – contains "metadata." This term generally refers to information about an electronic record that does not appear in the text but is automatically generated by the program when a text is created, viewed, copied, edited, printed, stored, or transmitted using a computer. The metadata are typically embedded in the record in a manner not readily viewed or understood by persons without specialized computer training, that enables one to locate information that is not shown in the text. We use the term "metadata" broadly to include any information embedded in the record that is not visible in the text.

The metadata may include a wide variety of information that the City has a right – and, in some cases, a legal duty – to withhold from public view. For example, earlier versions of an electronic record are present in metadata and often will include recommendations of the author of a draft, which the Sunshine Ordinance allows the City to withhold from disclosure. (S.F.

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[1] The term "PDF" is an abbreviation for Portable Document Format. As the term suggests, a PDF record functions as a "portable" document in that it may be transmitted electronically as a whole document and viewed and read on a computer screen. A scanned PDF record essentially is a picture of a document that may be viewed and read on a computer screen. A searchable PDF record permits the viewer/reader to search the document for specific words or phrases and to cut and paste from the document. Neither type of PDF record contains metadata embedded in the record.

Admin. Code §67.24(a)(1).) Such passages could include edits that are part of the author's thought process and were never intended to be communicated to another person. As a second example, earlier versions of an electronic record that are present in metadata may include information the disclosure of which would violate a third party's privacy – a right the law zealously safeguards. (Cal. Gov. Code §§ 6250, 6254(c); S.F. Admin. Code §67.1(g); Cal. Const., Art. I, sec. 1.) A wide range of types of information may be encompassed within the right of privacy; everything from residential phone numbers and Social Security numbers to sensitive medical, financial, and sexual data to information provided by, and the identity of, whistleblowers. As a third example, metadata may include communications between attorney and client that do not appear in the text of the record. The law protects confidential attorney-client communications from disclosure. (Cal. Evid. Code §954.) These examples are merely illustrative of the broader point that metadata may contain information specifically subject to redaction under the Public Records Act and the Sunshine Ordinance.

If a department were to give a requester a document in Word format, the department would be required to review the metadata embedded in the document. Failure to conduct this review would risk disclosure of privileged material. Yet reviewing the metadata would be a laborious, burdensome, and problematic task – different in nature and magnitude from the process of reviewing the text to determine information that should be redacted and information that is reasonably segregable from that which should be redacted. Electronic records may be adapted from any number of earlier texts – which would themselves contain metadata – and may have been subject to numerous edits. Information recorded in the process of creating and editing the text of such a document may be unknown to the author, the sender, and/or the recipient. The investigation necessary to determine whether redactions in metadata are legally warranted would in many cases be daunting. Merely identifying and interpreting certain of the metadata would require considerable expertise beyond the skill and capacity of all but a small number of City employees. And there is considerable risk that even those with the expertise would not locate all the metadata.

In addition, the metadata embedded in a Word document could reveal sensitive information about the operation of the City's computer and communications system that could be used by a third party to undermine the integrity and security of that system. For example, the disclosure of such information as unique identifiers for individual computer terminals and computer servers, and the location of information in a department's computer system, could compromise the integrity and security of the system. We do not understand that disclosure of metadata alone would in itself permit an unscrupulous individual to "hack" into the City's computer system. But should such an individual find his or her way into the City's system, knowledge about metadata gleaned from a Word document made available to the public could make it easier for that person to navigate his or her way through the system, locate sensitive files, alter or delete documents, and generally undermine the security of records within the system.

In making decisions about disclosure of public records, the City may not inquire as to a requester's purpose, or the use the requester may make of the information obtained. (Cal Gov. Code §6257.5; S.F. Admin. Code §67.25(c).) Requests from prudent, civic-minded persons must be treated the same as requests from reckless or ill-motivated persons. Further, disclosure of a record to one member of the public generally precludes the City from withholding that record from another member of the public. (Cal. Gov. Code §6254.5.) Thus, even if the City is certain that a particular requester has a legitimate purpose and would not misuse – or even review –

information contained in the metadata of a requested record, the City does not have the luxury of indulging benign assumptions about requesters when determining its response to a public records request for an electronic record in Word format.

These problems must be understood not from the vantage point of one isolated electronic record that may be the subject of a Task Force hearing. City government is comprised of scores of departments and even more boards, commissions, and advisory bodies, and there are literally millions of electronic records within the City's files, that have been created, edited, transmitted, or received by a workforce of approximately 25,000 to 30,000 employees. The staff resources of the City – technical, professional, and clerical – that may be devoted to responding to public records requests are limited.

If the City is required to disclose documents in Word format in response to a public records request, there could be a significant adverse impact on the conduct of City business – both everyday public business, and the business of responding to public records requests. The City has no control over the number and scope of public records requests it receives, or the number and scope of requests filed by a single person or small group of persons. The added burden of having to review metadata in electronic records could be crippling if the City is required to provide electronic records to requesters in Word rather than PDF format.

The City's duty to respond to a public records request is limited by a rule of reason. It has long been understood that public records laws do not impose absolute requirements on public entities. Rather, the efforts required to respond to a public records request are inherently bounded by a standard of reasonableness. In *Bruce v. Gregory* (1967) 65 Cal.2d 666, the California Supreme Court articulated this elementary principle of public records law:

> We ... hold that the rights created by [predecessor statutes to the Public Records Act] are, by their very nature, not absolute, but are subject to an implied rule of reason. Furthermore, this inherent reasonableness limitation should enable the custodian of public records to formulate regulations necessary to protect the safety of the records against theft, mutilation or accidental damage, to prevent inspection from interfering with the orderly function of his office and its employees, and generally to avoid chaos in the record archives.

Id. at 676. Both the California courts and the California Attorney General have extended *Bruce's* implied rule of reason to public records requests under the Public Records Act. (*Rosenthal v. Hansen* (1973) 34 Cal.App.3d 754, 761; 64 Ops.Cal.Atty.Gen. 186, 189-91 (1981) [Op. No. 80-1106]; 64 Ops.Cal.Atty.Gen. 317, 321 (1981) [Op. No. 80-1006]; 76 Ops.Cal.Atty. Gen. 235, 241 (1993) [Op. No. 93-702].)

There is no indication that the Board of Supervisors, in adopting the Sunshine Ordinance in 1993, or the voters, in amending the Ordinance in 1999, intended to jettison this longstanding principle of public records law. Indeed, in the context of assessing under both the Public Records Act and the Sunshine Ordinance the reasonableness of a search for records, the San Francisco Superior Court has ruled that the same reasonableness limitations applicable to the Act apply as well to the Ordinance.[2]

[2] *Western Select Securities, Inc. v. Murphy, et al.*, S.F. Superior Court No. 312310, Slip Op. at 5-6 (copy attached; stamped August 24, 2000, issued December 1, 2000). This ruling was

Memorandum

TO:	Honorable Members Sunshine Ordinance Task Force
DATE:	November 2, 2006
PAGE:	4
RE:	Providing Electronic Records In PDF Rather Than Word Format When Responding To A Public Records Request

In addition, Section 67.21-1(a) of the Sunshine Ordinance states that "[I]t is the policy of the City and County of San Francisco to utilize computer technology *in order to reduce the costs of public records management, including the costs of* collecting, maintaining, and *disclosing* records subject to disclosure to members of the public under this section." (S.F. Admin. Code §67.21-1(a) [emphasis added].)[3]

A court would likely conclude that these principles of reasonableness and cost containment that govern disclosure of public records under the Public Records Act and the Sunshine Ordinance permit the City to decline to provide to a requester metadata that is embedded in an electronic record such as a Word document. To require departments to disclose electronic records in Word format would necessitate their exhaustively searching and reviewing metadata in those records before finalizing a response to the requester. This process would entail considerable cost to the City, given the technical expertise and staff resources that would have to be devoted to it. Imposing this process on the City would contradict the City's own policy of using computer technology to reduce the costs incurred in disclosing public records.

Protecting The Text Of The Electronic Record

The text of a Word document may be easily edited or otherwise altered by the requester or by persons to whom the requester makes the document available. The alteration would not be obvious or readily discernible to the average person or even in many cases to someone generally familiar with the document. As a result, providing a record in Word format to a requester jeopardizes the integrity of the record. That format makes it easy for the requester or others to change the record and then present the altered record as the original. Apart from any such questionable purpose, if the City provides a record in Word format and the requester or others edit or otherwise alter the record, there is the potential for creating confusion, even inadvertently, as to whether the original record or the altered version is the true public record.

The Public Records Act allows public entities to address these concerns in making records available to the public. Section 6253.9 of the Act addresses information in an electronic format. (Cal. Gov. Code §6253.9.) Subsection (f) states: "Nothing in this section shall be construed to require the public agency to release an electronic record in the electronic form in which it is held by the agency if its release would jeopardize or compromise the security or integrity of the original record or of any proprietary software in which it is maintained." (Cal. Gov. Code §6253.9(f).) Disclosure of a record in Word format could jeopardize the integrity of

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not disturbed on appeal. *See Western Select Securities , Inc. v. Superior Court*, Court of Appeal, First District, Case No. A093500, May 3, 2001 (order denying petition for writ of mandate). While a trial court opinion generally may not be cited as precedent in a judicial proceeding (*see* Cal. Rule of Court 977), this trial court opinion nonetheless may shed light on whether a court would be receptive to the point that the Sunshine Ordinance carries forward the principle, recognized both pre- and post-Public Records Act, that public records laws are subject to an implied or inherent rule of reason.

[3] In addition, we note that the Sunshine Ordinance endorses "[I]mplementing a system that permits reproduction of electronic copies of records *in a format that is generally recognized as an industry standard format.*" (S.F. Admin. Code §67.21-1(b)(2) [emphasis added].) It is our understanding that PDF versions of electronic records are generally recognized as an "industry standard format" for providing copies of electronic records.

the record because the text is so easily manipulated. Subsection (f) thus gives City departments discretion to choose to provide the record to a requester in other more secure formats, and nothing in the Sunshine Ordinance changes this result.

We recognize that computer-savvy experts using sophisticated technological aids are able to tamper with electronic records in some formats other than Word. But this possibility does not change the legal analysis. Subsection (f) permits a department to provide an electronic record to a member of the public in a format less susceptible to textual manipulation than the format requested. A Word document is much more susceptible to textual manipulation, as compared, for example, to a record in scanned PDF format. So long as the integrity of the record is jeopardized by making it available in Word format, Subsection (f) permits the City to provide it in another format.

Conclusion

A court would likely conclude that a City department has discretion under both the Public Records Act and the Sunshine Ordinance to provide an electronic record to a public records requester in PDF rather than Word format.[4]

* * * * *

We hope this memorandum proves useful to the Task Force in its analysis and discussion of an important issue. If there are any questions or concerns on the general issue, divorced from the particulars of any specific case, please feel free to contact this office.

P.Z.

[4] This memorandum does not address the power of a court in a litigation context to order or limit access of a party to another party's electronic records.