

Date: Oct. 26, 2010

Item No. 9

File No. 10042

SUNSHINE ORDINANCE TASK FORCE

AGENDA PACKET CONTENTS LIST*

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Completed by: Chris Rustom

Date: Oct. 21, 2010

***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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**MEMORANDUM
PRIVILEGED AND CONFIDENTIAL**

TO: Sunshine Ordinance Task Force
FROM: Jana Clark
Deputy City Attorney
DATE: September 23, 2010
RE: *10042 Cal Tilden v. Recreation and Parks Department*

COMPLAINT

Complainant Cal Tilden alleges that the Recreation and Parks Department ("the Department") violated the Ordinance by failing to provide a prospective lessee's response to an RFQ for the Stow Lake Concession prior to its public meeting regarding that lease, scheduled for August 19, 2010, thereby undermining his right to participate in public comment.

COMPLAINANT FILES COMPLAINT:

On August 2, 2010, Mr. Tilden filed a complaint against the Department.

JURISDICTION

The Recreation and Parks Department is a charter department under the Ordinance. The Task Force therefore has jurisdiction to hear the complaint against the Department.

APPLICABLE STATUTORY SECTION(S):

Section 67 of the San Francisco Administrative Code:

- Section 67.21 governs responses to a public records request, and the format of requests and of responsive documents.
- Section 67.24(e)(1) governs public information that must be disclosed regarding the bidding process for public contracts, bids, and proposals.
- Section 67.26 governs withholding of records.
- Section 67.27 governs written justification for withholding of records.
- Section 67.5 governs public access to meetings of policy bodies.
- Section 67.15 governs public testimony at meetings of policy bodies.

Section 6250 et seq. of the Cal. Gov't Code

- Section 6253 governs the release of public records and the timing of responses.

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APPLICABLE CASE LAW:

None

ISSUES TO BE DETERMINED**Contested/Uncontested Facts:**

It appears that the relevant facts are not in dispute. Mr. Tilden stated that the Department issued a request for RFQ for the Stow Lake concessions lease and that responses were due April 6, 2010. He alleged further that on August 19, 2010, the Department was scheduled to receive staff recommendations and to vote to authorize staff to enter into lease negotiations with the Ortega Group. Mr. Tilden alleged that prior to the August 19, 2010 meeting, he requested that the Department provide him with a copy of prospective lessee Ortega Family Enterprises response to the RFQ. He alleged further that without the response, there would be no way to meaningfully participate in public testimony at the August 19, 2010 meeting.

Nicholas Kinsey, Assistant Director of the Department, replied to Mr. Tilden's complaint in a July 27, 2010 email, informing Mr. Tilden that the Sunshine Ordinance required that all "responses to requests for proposals and all other records of communications between the department and persons or firms seeking contracts shall be open to inspection immediately after the contract has been awarded." Also in the email, the Department stated that the requested document would be available for inspection once the Board of Supervisors approved the final contract and noted that there were numerous, mandated public meetings regarding the Stow Lake Concession.

In a follow-up to the email, Olive Gong, Custodian of Records for the Department, responded that the Department was withholding the response to the RFQ in reliance on section 67.24(e) of the Ordinance. Ms. Gong stated that the Department would make the document available once the Board of Supervisors approved the contract for the Stow Lake Concession.

In a reply to the Department's response, complainants alleged that 67.24(e) applied only to an RFP and not to an RFQ, and that an RFQ is a conceptual proposal, as distinguished from an actual bid.

LEGAL ISSUES/LEGAL DETERMINATIONS:

Does section 67.24(e)(1) allow the Department to withhold the prospective lessee Ortega Family Enterprises' response to the RFQ?

If yes, does section 67.15 require the Department to release documents not otherwise subject to release under section 67.24(e)(1) if the complainant states that review of the documents prior to the meeting is necessary for him to provide meaningful public testimony.

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If the facts alleged by complainants are true, was there a violation of the state and/or local public records or meetings law?

CONCLUSION

THE TASK FORCE FINDS THE FOLLOWING FACTS TO BE TRUE:

THE TASK FORCE FINDS THE ALLEGED VIOLATIONS TO BE **TRUE OR NOT TRUE.**

THE CALIFORNIA CONSTITUTION AS AMENDED BY PROPOSITION 59 IN 2004 PROVIDES FOR OPENNESS IN GOVERNMENT.

Article I Section 3 provides:

- a) The people have the right to instruct their representative, petition government for redress of grievances, and assemble freely to consult for the common good.
- b)(1) The people have the right of access to information concerning the conduct of the people's business, and therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny.
- 2) A statute, court rule, or other authority, including those in effect on the effective date of this subdivision that limits the right of access shall be adopted with findings demonstrating the interest protect by the limitation and the need for protecting that interest.
- 3) Nothing in this subdivision supersedes or modifies the right of privacy guaranteed by Section 1 or affects the construction of any statute, court rule, or other authority to the extent that it protects that right to privacy, including any statutory procedures governing discovery or disclosure of information concerning the official performance or professional qualifications of a peace officer.
- 4) Nothing in this subdivision supersedes or modifies any provision of this Constitution, including the guarantees that person may not be deprived of life, liberty, or property

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without due process of law, or denied equal protection of the laws, as provided by Section 7.

5) This subdivision does not repeal or nullify, expressly or by implication, any constitutional or statutory exception to the right of access to public records or meetings or public bodies that is in effect on the effective date of this subdivision, including, but not limited to, any statute protecting the confidentiality of law enforcement and prosecution records.

6) Nothing in this subdivision repeals, nullifies, supersedes, or modifies protections for the confidentiality of proceedings and records of the Legislature, the Members of the Legislature, and its employees, committee, and caucuses provided by Section 7 of Article IV, state law, or legislative rules adopted in furtherance of those provisions: nor does it affect the scope of permitted discovery in judicial or administrative proceedings regarding deliberations of the Legislature, the Members of the Legislature, and its employees, committees, and caucuses.

ATTACHED STATUTORY SECTIONS FROM CHAPTER 67 OF THE SAN FRANCISCO ADMINISTRATIVE CODE (THE SUNSHINE ORDINANCE) UNLESS OTHERWISE SPECIFIED

SEC. 67.21. PROCESS FOR GAINING ACCESS TO PUBLIC RECORDS; ADMINISTRATIVE APPEALS.

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

(l) 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. Inspection of documentary public information on a computer monitor need not be allowed where the information sought is necessarily and unseparably intertwined with information not subject to disclosure under this ordinance. Nothing in this section shall require a department to program or reprogram a computer to respond to a request for information or to release information where the release of that information would violate a licensing agreement or copyright law.

SEC . 67.24. PUBLIC INFORMATION THAT MUST BE DISCLOSED

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Contracts, Bids and Proposals.

(e)

(1)

Contracts, contractors' bids, responses to requests for proposals *and all other records of communications between the department and persons or firms seeking contracts* shall be open to inspection immediately after a contract has been awarded. Nothing in this provision requires the disclosure of a private person's or organization's net worth or other proprietary financial data submitted for qualification for a contract or other benefit until and unless that person or organization is awarded the contract or benefit. All bidders and contractors shall be advised that information provided which is covered by this subdivision will be made available to the public upon request. Immediately after any review or evaluation or rating of responses to a Request for Proposal ("RFP") has been completed, evaluation forms and score sheets and any other documents used by persons in the RFP evaluation or contractor selection process shall be available for public inspection. The names of scorers, graders or evaluators, along with their individual ratings, comments, and score sheets or comments on related documents, shall be made immediately available after the review or evaluation of a RFP has been completed.

(2)

Notwithstanding the provisions of this Subdivision or any other provision of this ordinance, the Director of Public Health may withhold from disclosure proposed and final rates of payment for managed health care contracts if the Director determines that public disclosure would adversely affect the ability of the City to engage in effective negotiations for managed health care contracts. The authority to withhold this information applies only to contracts pursuant to which the City (through the Department of Public Health) either pays for health care services or receives compensation for providing such services, including mental health and substance abuse services, to covered beneficiaries through a pre-arranged rate of payment. This provision also applies to rates for managed health care contracts for the University of California, San Francisco, if the contract involves beneficiaries who receive services provided jointly by the City and University. This provision shall not authorize the Director to withhold rate information from disclosure for more than three years.

(3)

During the course of negotiations for:

(i)

personal, professional, or other contractual services not subject to a competitive process or where such a process has arrived at a stage where there is only one qualified or responsive bidder;

(ii)

leases or permits having total anticipated revenue or expense to the City and County of five hundred thousand dollars (\$500,000) or more or having a term of ten years or more; or

(iii)

any franchise agreements,

all documents exchanged and related to the position of the parties, including draft contracts, shall be made available for public inspection and copying upon request. In the event that no records are prepared or exchanged during negotiations in the above-mentioned categories, or the records exchanged do not provide a meaningful representation of the respective positions, the City Attorney or City representative familiar with the negotiations shall, upon a written request by a member of the public, prepare written summaries of the respective positions within five working

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days following the final day of negotiation of any given week. The summaries will be available for public inspection and copying. Upon completion of negotiations, the executed contract, including the dollar amount of said contract, shall be made available for inspection and copying. At the end of each fiscal year, each City department shall provide to the Board of Supervisors a list of all sole source contracts entered into during the past fiscal year. This list shall be made available for inspection and copying as provided for elsewhere in this Article.

SEC. 67.26. WITHHOLDING KEPT TO A MINIMUM.

No record shall be withheld from disclosure in its entirety unless all information contained in it is exempt from disclosure under express provisions of the California Public Records Act or of some other statute. Information that is exempt from disclosure shall be masked, deleted or otherwise segregated in order that the nonexempt portion of a requested record may be released, and keyed by footnote or other clear reference to the appropriate justification for withholding required by section 67.27 of this article. This work shall be done personally by the attorney or other staff member conducting the exemption review. The work of responding to a public-records request and preparing documents for disclosure shall be considered part of the regular work duties of any city employee, and no fee shall be charged to the requester to cover the personnel costs of responding to a records request.

SEC. 67.27. JUSTIFICATION OF WITHHOLDING.

Any withholding of information shall be justified, in writing, as follows:

- (a) A withholding under a specific permissive exemption in the California Public Records Act, or elsewhere, which permissive exemption is not forbidden to be asserted by this ordinance, shall cite that authority.
- (b) A withholding on the basis that disclosure is prohibited by law shall cite the specific statutory authority in the Public Records Act or elsewhere.
- (c) A withholding on the basis that disclosure would incur civil or criminal liability shall cite any specific statutory or case law, or any other public agency's litigation experience, supporting that position.
- (d) When a record being requested contains information, most of which is exempt from disclosure under the California Public Records Act and this Article, the custodian shall inform the requester of the nature and extent of the nonexempt information and suggest alternative sources for the information requested, if available.

SEC. 67.15. PUBLIC TESTIMONY.

- (a) Every agenda for regular meetings shall provide an opportunity for members of the public to directly address a policy body on items of interest to the public that are within policy body's subject matter jurisdiction, provided that no action shall be taken on any item not appearing on the agenda unless the action is otherwise authorized by Section 67.7(e) of this article. However, in the case of a meeting of the Board of Supervisors, the agenda need not provide an opportunity for members of the public to address the Board on any item that has already been considered by a

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committee, composed exclusively of members of the Board, at a public meeting wherein all interested members of the public were afforded the opportunity to address the committee on the item, before or during the committee's consideration of the item, unless the item has been substantially changed since the committee heard the item, as determined by the Board.

(b) Every agenda for special meetings at which action is proposed to be taken on an item shall provide an opportunity for each member of the public to directly address the body concerning that item prior to action thereupon.

(c) A policy body may adopt reasonable regulations to ensure that the intent of subdivisions (a) and (b) are carried out, including, but not limited to, regulations limiting the total amount of time allocated for public testimony on particular issues and for each individual speaker. Each policy body shall adopt a rule providing that each person wishing to speak on an item before the body at a regular or special meeting shall be permitted to be heard once for up to three minutes. Time limits shall be applied uniformly to members of the public wishing to testify.

(d) A policy body shall not abridge or prohibit public criticism of the policy, procedures, programs or services of the City, or of any other aspect of its proposals or activities, or of the acts or omissions of the body, on the basis that the performance of one or more public employees is implicated, or on any basis other than reasonable time constraints adopted in regulations pursuant to subdivision (c) of this section.

(e) To facilitate public input, any agenda changes or continuances shall be announced by the presiding officer of a policy body at the beginning of a meeting, or as soon thereafter as the change or continuance becomes known to such presiding officer.

CAL. PUBLIC RECORDS ACT (GOVT. CODE §§ 6250, ET SEQ.)

SECTION 6253

(a) Public records are open to inspection at all times during the office hours of the state or local agency and every person has a right to inspect any public record, except as hereafter provided. Any reasonably segregable portion of a record shall be available for inspection by any person requesting the record after deletion of the portions that are exempted by law.

(b) Except with respect to public records exempt from disclosure by express provisions of law, each state or local agency, upon a request for a copy of records that reasonably describes an identifiable record or records, shall make the records promptly available to any person upon payment of fees covering direct costs of duplication, or a statutory fee if applicable. Upon request, an exact copy shall be provided unless impracticable to do so.

(c) Each agency, upon a request for a copy of records, shall, within 10 days from receipt of the request, determine whether the request, in whole or in part, seeks copies of disclosable public records in the possession of the agency and shall promptly notify the person making the request of the determination and the reasons therefor. In unusual circumstances, the time limit prescribed in this section may be extended by written notice by the head of the agency or his or her designee to the person making the request, setting forth the reasons for the extension and the date on which a determination is expected to be dispatched. No notice shall specify a date that would result in an extension for more than 14 days. When the agency dispatches the determination, and if the agency determines that the request seeks disclosable public records, the agency shall state the estimated date and time when the records will be made available. As used in this section,

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“unusual circumstances” means the following, but only to the extent reasonably necessary to the proper processing of the particular request:

- (1) The need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request.
- (2) The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records that are demanded in a single request.
- (3) The need for consultation, which shall be conducted with all practicable speed, with another agency having substantial interest in the determination of the request or among two or more components of the agency having substantial subject matter interest therein.
- (4) The need to compile data, to write programming language or a computer program, or to construct a computer report to extract data.

BRIEF--Complaint # 10042 {Page 1 Of 2}

Sunshine Ordinance Task Force
1 Dr Carlton B. Goodlett Place
San Francisco, CA 94102

RE: Complaint #10042 {Continued}
Cal Tilden vs. Recreation and Park Department & Commission
DATE: October 26, 2010

RECEIVED
BOARD OF SUPERVISORS
SAN FRANCISCO
2010 OCT 18 PM 2:24
BY _____ ALK

COMPLAINT: The Recreation and Park Department and Commission have refused to make public the Ortega Family Enterprise response to a Request for Qualifications (RFQ) relating to the Stow Lake Concession Lease. See brief for September 28th meeting for details.

It is my contention that such refusal is in violation of San Francisco's Sunshine Ordinance which is summarized in Section 67.1(a) as follows: "Government's duty is to serve the public, reaching its decisions in full view of the public"

TESTIMONY: Attached is a written copy of the verbal testimony I gave at the September 28, 2010 hearing.

SUMMARY: All parties agree that there is no question Section 67.24(e) applies to Requests for Proposals (RFP) but at the same time there exists a clear debate if this section applies to Requests for Qualifications (RFQ). Is it legitimate or legal to use 67.24(e) to keep a RFQ secret? My complaint is that withholding the Ortega's response to the RFQ is not justified under Section 67.

Although not yet made part of the Sunshine Ordinance, the Task Force has recognized this debate and confusion over RFP vs. RFQ and pending are two amendments adopted by the Task Force to Section 67.24(e) by the addition of the following two completely new paragraphs:

NEW: (e)(1) All City Requests for Bids ("RFB"), Requests for Proposals ("RFP"), Requests for Quotes ("RFQuote"), Requests for Information ("RFI"), and Requests for Qualifications ("RFQ") and similar requests shall be posted on the City's website from the date of issuance, and also kept in a central repository and shall be made available for public inspection.

NEW: (e)(2) All responses to a RFQuote, RFI, and RFQ are public records that shall be made public upon receipt by the City. The City is encouraged to post all responses to RFQuotes, RFIs and RFQs on the City's websites.

I recognize that the above proposed Sunshine Ordinance amendments do not carry any weight of law until adopted, but they certainly set forth the thinking of the Task Force as to making a RFQ public upon receipt. All that remains is formal adoption.

CLARIFICATION: As the term RFQ can mean either a Request for Quote or a Request for Qualifications, its use by the Recreation and Park Department & Commission is clearly a Request for Qualifications as set forth in their documentation. In the December 3, 2009 memo to the Commission, the staff writes that the ... "RFQ focuses on soliciting respondents with the necessary **qualifications...**" and it then calls for a conceptual plan for improvements and operation of the concession. There is no justification to keep a "conceptual" plan secret.

HISTORIC RAMIFICATIONS: The request to view the Ortega's response to the RFQ is more than an academic exercise. The proposed changes will substantially alter the historic purpose and ways in which Stow Lake has served San Franciscans since 1893. Sadly, these proposed changes will take place without any public disclosure of how the Ortegas gained the right to be the selected vendor. We discovered that in their stated response to the RFQ they claimed 22 years of experience managing Carlsbad Cruise Lines in New Mexico. This turns out to be false. This serious discrepancy clearly indicates that the selection committee did not exercise any due diligence. This is shocking considering boating experience is a vital qualification for this operation. Only through release can it be determined if other false representations were made? The due diligence review by Recreation and Park staff does not pass the smell test!

Considering this pending historic change and the strong public outcry in opposition to such change, I encourage the Task Force to favor transparency in resolving any uncertainty and require the Recreation and Park Department to release immediately the Ortega's response to the Stow Lake RFQ.

Respectively submitted,



Cal Tilden

Testimony by Cal Tilden at the Sunshine Task Force hearing relating to Cal Tilden vs. The Recreation and Park Department [Complaint # 10042] on 9/28/2010

Good afternoon. My name is Cal Tilden. Thank you for hearing my complaint. I apologize for reading my testimony but with the 5 minute time limit it is the only way I can cover what needs to be said.

First some history and disclosure. My father reintroduced rental boats to Stow Lake in 1943...over 67 years ago. I have been involved for 61 years since receiving my first paycheck working there in 1949. The present lessee is my nephew, Bruce McLellan who is here with me today to answer any questions you may have. I no longer have any financial interest in the concession, only a deep lifetime emotional attachment.

I have negotiated every lease for the concession since 1957 including the most recent one. Over those 53 years, I never experienced the secrecy and lack of transparency now going on at the Recreation and Park Department. It is ironic that the Sunshine Ordinance is being used as a shield to deny transparency. Since 1943, all lease negotiation were RFPs, true bids. They were all opened at McLaren Lodge and passed around the table for all bidders to read. That was true transparency.

Now to the present. The Department is clearly in violation of Section 67.1(a) which reads..."Government's duty is to serve the public, reaching its decisions in full view of the public" In February of this year, the Park Department issued a Request for Qualification (RFQ) for the Stow Lake Concession lease. The Ortega group received the highest points in the evaluation process based on what was contained in their response. As portions of the Ortega response have been kept secret, it was not possible to present public testimony at the Recreation and Park Commission Meeting on August 19, 2010 relating to that response. Community meetings being held are just window dressing without the disclosure of all the underlying information

Multiple requests following the Sunshine Ordinance procedures have been made for access to the Ortega's response and all have been denied based on Section 67.24(e) (1). No other reasons were given. The use of 67.24(e)(1) as justification for denial is a gross misreading of that Section for 2 reasons.

First, the Section references RFPs [requests for proposals] in three places and makes absolutely no reference to RFQs [request for qualifications]. The Ortega response was to a RFQ.

Second, and more to the point, that section only states what must be released after an award. It makes no reference as to what can or can not be released prior to an award.

Accordingly, the several denials based on Section 67.24 (e) (1) are totally invalid.

What is really inconsistent and unethical is that selected portions of the Ortega's response to the RFQ were leaked to the public in July on the internet. This took place before the selection process was finalized. Then at the August 19th Commission meeting, some additional selected information was presented to the Commission. Thus, some of the information contained in the Ortega's response has been released to the public domain yet the entire document is being kept secret. This inconsistency just does not pass the smell test.

IN CONCLUSION, I ask that the Task Force determine:

1. That the Recreation and Park department is in violation of the sunshine ordinance 67.1(a), as well as the spirit and intent of the Sunshine Ordinance objective for open government.
2. That use of Section 67.24(e) (1) is invalid in denying release of the requested document,

AND FINALLY

3. That the Park Department be ordered by the Task Force to release in its entirety the Ortega's response to the RFQ for the Stow Lake Concession lease. As that response had to be submitted electronically, the release should also be electronic. This is in compliance with Section 67.21-1(a) calling for electronic transmissions whenever possible.

Thank you