

Date: October 27, 2009

Item No. 11 & 12

File No. 09057

## SUNSHINE ORDINANCE TASK FORCE

### AGENDA PACKET CONTENTS LIST\*

- Peter Warfield v Clerk of the Board of Supervisors**
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Completed by: Chris Rustom

Date: Oct. 21, 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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## MEMORANDUM

October 27, 2009:

*PETER WARFIELD v. CLERK OF THE BOARD (09057)*

### COMPLAINT

#### THE COMPLAINANT ALLEGES THE FOLLOWING:

Complainant Peter Warfield alleges that he requested information from the Clerk of the Board (the "Clerk") concerning support and opposition letters related to legislation being considered by the Board of Supervisors ("BOS"). He further alleges that the Deputy Clerk provided documents responsive to the request, but that the information was redacted from the documents that would identify the sender of the correspondence. Mr. Warfield further alleges that the Clerk failed to provide a written justification for withholding of this information.

#### COMPLAINANT FILES COMPLAINT:

On 9/9/2009, Mr. Warfield filed a Complaint against the Clerk for alleged violations of Sections 67.21(a) & (b), 67.26, and 67.27 of the Sunshine Ordinance.

#### JURISDICTION

The Clerk is City department under the San Francisco City Charter.

#### APPLICABLE STATUTORY SECTION(S):

Section 67 of the San Francisco Administrative Code:

Section 67.1(g) deals with recognition of the right to privacy by individuals.

Section 67.20 deals with the definition of public information, including public records.

Section 67.21 deals with the process for requesting and producing public records.

Section 67.21(g) provides that there is a presumption that a record is public.

Section 67.26 deals with withholding of information from a public record.

**MEMORANDUM**

Section 67.27 deals with written justification for withholding information from a public record.

San Francisco Administrative Code, Chapter M deals with disclosure by City government of the private information of individuals.

Sections 6250 et seq. of the Cal. Government Code

Section 6252(e) defines "public record."

Section 6253 deals with public inspection of public records.

Section 6254 deals with exemptions from disclosure of particular records, including subsection (c) which deals with personal information, the disclosure of which would constitute an invasion of personal privacy.

**APPLICABLE CASE LAW:**

- *Stolt-Nielsen Transportation Group, Ltd. v. United States*, 408 F. Supp.2d 166 (2007) (*reversed and remanded on separate grounds*) (holding that personal email addresses are exempt from disclosure in response to a FOIA request because disclosure would invade individual privacy and disclosure would not shed light on government functions).
- *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182 (1999) (holding that requirement that paid signature gatherers on petitions wear badges identifying their names infringed the petitioner's First Amendment rights to petition their government, because forced disclosure of their identity had the effect of discouraging their participation in gathering petition signatures).
- *Buckley v. McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995) (ban on anonymous publication of handbill opposing ballot initiative struck down as violation of First Amendment right to anonymous speech).
- *John Doe #1 v. Reed*, 2009 U.S. Dist. Lexis 91745 (2009) (Federal District Court issued preliminary injunction preventing disclosure under Washington State Public Records Act of names and contact information of signers of petition seeking to overturn state law expanding domestic partners rights; court found that requirement of public disclosure of identifying information of petition signatories likely violated the First Amendment rights of petitioners to anonymous speech. On October 15, 2009, the Ninth Circuit issued an order staying the preliminary injunction. On October 19, 2009, Supreme Court Justice Kennedy issued an order staying the October 15, 2009 order of the Ninth Circuit, leaving in effect the district court injunction. )

**MEMORANDUM****ISSUES TO BE DETERMINED****1. FACTUAL ISSUES**

**A. Uncontested Facts:** Mr. Warfield requested documents constituting correspondence related to legislation being considered by the BOS. The Clerk responded to his request by providing copies of the requested documents but redacted personal contact information of the senders of the correspondence. Warfield further alleges that the Clerk provided no written justification for withholding information from the requested public record.

**B. Contested facts/ Facts in dispute:**

The Clerk has not contested the allegations of Mr. Warfield. It is unclear from the allegations when Mr. Warfield made the requests he complains about.

**QUESTIONS THAT MIGHT ASSIST IN DETERMINING FACTS:**

- What was the exact date of Mr. Warfield's request?
- Did the Clerk redact the contact information from the document in question?
- If so, did the Clerk provide any written explanation of its redaction in response to the request?

**LEGAL ISSUES/LEGAL DETERMINATIONS:**

- Were sections of the Sunshine Ordinance, Public Records Act, and/or California Constitution Article I, Section three violated?
- Was there an exception to the Sunshine Ordinance, under State, Federal, or case law?

**SUGGESTED ANALYSIS****Under Section 67.21 of the Ordinance:**

- Did the Clerk withhold information from a responsive document by redacting it?
- If so, did the Clerk provide a justification for such withholding, as required by Section 67.21(b)?

**Under Section 67.26 of the Ordinance:**

- If the Clerk did withhold information from a responsive document, did she keep the withholding to a minimum, as required under Section 67.26?

**Under Section 67.27 of the Ordinance:**

- If the Clerk did withhold information from a responsive document, did she provide a written justification for such withholding, as required under Section 67.27?
- If so, was the Clerk's justification for withholding in compliance with the requirements of Section 67.27?

**MEMORANDUM**

**Under Section 6254 of the Cal. Public Records Act:**

- If the Clerk did provide a justification for withholding information from a responsive document, did her justification fit within an exemption listed in Section 6254?
- If so, does the information withheld fit within the listed exemption?
- If the Clerk did provide a justification for withholding information from a responsive document, did she provide legal authority for her withholding outside of Section 6254?
- If so, is the withholding of the information justified by the legal authority cited?

**Under The California and Federal Constitution:**

- Would the personal contact information of citizens writing to the BOS in connection with legislation be considered "private" so as to invoke the right to privacy under the California Constitution?
- Would disclosure of the personal contact information of citizens writing to the BOS in connection with legislation be considered such an invasion of privacy as to discourage citizens from exercising their right to petition their government under the First Amendment to the U.S. Constitution?

**CONCLUSION**

THE TASK FORCE FINDS THE FOLLOWING FACTS TO BE TRUE:

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

**ATTACHED STATUTORY SECTION FROM CHAPTER 67 OF THE SAN FRANCISCO ADMINISTRATIVE CODE UNLESS OTHERWISE SPECIFIED**

Section 67.1(g): Private entities and individuals and employees and officials of the City and County of San Francisco have rights to privacy that must be respected. However, when a person or entity is before a policy body or passive meeting body, that person, and the public, has the right to an open and public process.

**MEMORANDUM**

Section 67.20 (b): "Public Information" shall mean the content of "public records" as defined in the California Public Records Act (Government Code Section 6252), whether provided in documentary form or in an oral communication. deals with the definition of public information, including public records.

Section 67.21:

(a) Every person having custody of any public record or public information, as defined herein, (hereinafter referred to as a custodian of a public record) shall, at normal times and during normal and reasonable hours of operation, without unreasonable delay, and without requiring an appointment, permit the public record, or any segregable portion of a record, to be inspected and examined by any person and shall furnish one copy thereof upon payment of a reasonable copying charge, not to exceed the lesser of the actual cost or ten cents per page.

(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.

(g) In any court proceeding pursuant to this article there shall be a presumption that the record sought is public, and the burden shall be upon the custodian to prove with specificity the exemption which applies.

Section 67.26: 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.

Section 67.27:

(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.

**SAN FRANCISCO ADMINISTRATIVE CODE, CHAPTER 12M (Added by Proposition D, 11/7/2006)**

**Sec. 12M.1 Definitions.**

**MEMORANDUM**

For the purposes of this Chapter, the following definitions shall apply to the terms use herein.

(a) "City" shall mean the City and County of San Francisco.

...

(e) "Private Information" shall mean any information that (1) 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; or (2) the law forbids any person from disclosing.

**Sec. 12M.2. Nondisclosure Of Private Information.**

(a) The City shall not disclose Private Information to any person or entity unless specifically authorized to do so by the subject individual or by Contract or where required by Federal or State law or judicial order. The City shall not enter into any Contract for the primary purpose of disclosing Private Information and shall not receive any compensation for the disclosure of Private Information.

(b) No Contractor or Subcontractor who receives Private Information from the City in the performance of a Contract may disclose that information to a Subcontractor or any other person or entity, unless the Contract authorizes the disclosure, the Contractor has first received written approval from the Contracting Department to disclose the information, or the disclosure is expressly required by judicial order. The disclosure and the use of the information shall be in accordance with any conditions or restrictions stated in the Contract or the Contracting Department's approval and shall not be used except as necessary in the performance of the obligations under the Contract. The department head or the department head's designee shall sign any approvals of the Contracting Department.

**Sec. 12M.3. Enforcement.**

Any failure of a Contractor to comply with the requirements of Section 12M.2 of this Chapter shall be a material breach of the Contract. In such an event, in addition to any other remedies available to it under equity or law, the City may terminate the Contract, bring a false claim action against the Contractor pursuant to Chapter 6 or Chapter 21 of the Administrative Code, or debar the Contractor.

**Sec. 12M.4. Contract Requirements.**

All Contracts and amendments to Contracts entered into after ninety days after the effective date of this Chapter shall incorporate by reference the provisions of Sections 12M.2 and 12M.3 of this Chapter.

**Sec. 12M.5. Exceptions.**

This Chapter shall not apply in the following circumstances:

(a) When a Contract involves the expenditure of funds received by the City and County to the extent the application of the Chapter would violate or be inconsistent with the terms or conditions of the applicable grant agreement, subvention or agreement or the instructions of an authorized representative of any such agency with respect to any such grant agreement, subvention or agreement.



**MEMORANDUM**

(b) When a Contract is for the purchase, sale, transfer or lease of any interest in real property or a license or permit for the use of real property.

**Sec. 12M.6. Preemption.**

Nothing in this Chapter shall be interpreted or applied so as to create any power or duty in conflict with any Federal or State law.

**SECTIONS 6250 ET SEQ. OF THE CAL. GOVERNMENT CODE**

Section 6252(e): "Public records" includes any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics.

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.

Section 6254(c): "Personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy."

**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.

**MEMORANDUM**

- 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 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.

**THE CALIFORNIA CONSTITUTION PROVIDES FOR A RIGHT TO PRIVACY****ARTICLE 1 DECLARATION OF RIGHTS**

**SECTION 1.** All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and **privacy**.

**UNITED STATES CONSTITUTION, AMENDMENT 1.**

"Congress shall make no law ... abridging ... the right of the people ... to petition the Government for a redress of grievances."



<complaints@sfgov.org>  
09/09/2009 02:37 PM

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

Submitted on: 9/9/2009 2:37:46 PM

Department: Board of Supervisors

Contacted:

Public\_Records\_Violation: Yes

Public\_Meeting\_Violation: No

Meeting\_Date:

Section(s)\_Violated:

Description: We requested information from the Clerk of the Board of Supervisors that included information about the current membership of the Library Citizens Advisory Committee (LCAC), of which I am a member. We were told to return in a little more than three hours so that redactions could be made. This provided an unnecessary delay in reviewing the full file, in violation of the Sunshine Ordinance's promptness requirements. In discussion with the Deputy Clerk, we then requested a more prompt provision of just the two-page current member roster. This was provided promptly in a few minutes, for which we thank the Deputy Clerk. But when we requested a copy, the contact information was redacted -- and, because it was whited out, it was not possible to see what was redacted. There was also no written notation as to statutory authority to redact. We ask that you provide us with an Order of Determination that orders the Clerk to provide this sort of information without redaction of contact information such as 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:

City:

Zip:

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: Clerk of the Board, Redaction of Contact Information from the LCAC Membership File

Ladies and Gentlemen:

We would like a hearing on this matter as soon as possible.

We requested information from the Clerk of the Board of Supervisors that included information about the current membership of the Library Citizens Advisory Committee (LCAC), of which I am a member.

We were told to return in a little more than three hours so that redactions could be made. This provided an unnecessary delay in reviewing the full file, in violation of the Sunshine Ordinance's promptness requirements.

In discussion with the Deputy Clerk, we then requested a more prompt provision of just the two-page current member roster. This was provided promptly in a few minutes, for which we thank the Deputy Clerk. But when we requested a copy, the contact information was redacted -- and, because it was whited out, it was not possible to see what was redacted. There was also no written notation as to statutory authority to redact.

We ask that you provide us with an Order of Determination that orders the Clerk to provide this sort of information without redaction of contact information such as 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



**MEMORANDUM**

Date: May 23, 2008  
To: Clerk of the Board Staff  
Assessment Appeals Board  
Office of the Legislative Analyst  
Sunshine Ordinance Task Force  
Youth Commission  
From: Angela Calvillo, Clerk of the Board  
Subject: Redacting Policy

The following redacting policy is established for the department. The policy was developed in consideration of the Sunshine Ordinance and the California Public Records Act.

**REDACTION POLICY: PERSONAL INFORMATION**

The Office of the Clerk of the Board, pursuant to §2.108 of the Charter, shall liberally provide for the public's access to information, documents and records. In accordance with local and state laws<sup>1</sup>, it shall be the policy of the Clerk's Office and its agencies to redact all personal information including, but not limited to, the home address, telephone numbers, e-mail addresses, etc., from requested records prior to release to or review by third parties (the public) and prior to copying and/or posting on the Internet. The Clerk's Office will not redact personal information if the individual whose personal information has been obtained has indicated that he/she authorizes the release of his/her personal information.

Copy provided  
Courtesy of  
Library Users Assn.  
(415) 753-2180

Note: The Clerk's policy does not cite specific sections of the Sunshine Ordinance that allow or require the redactions described. See complaint #09056 09057

<sup>1</sup> Cal. Gov. Code §§6250 and 6254; Cal. Constitution, Article I, §1; Administrative Code §67.1 (g)