Date: Oct. 28, 2008

Item No. 4
File No. 08039

SUNSHINE ORDINANCE TASK FORCE

AGENDA PACKET CONTENTS LIST*

- ☒ **Complaint by: Allen Grossman v. City Attorney's Office**
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Completed by: Chris Rustom **Date:** Oct. 23, 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.

CITY AND COUNTY OF SAN FRANCISCO

DENNIS J. HERRERA
City Attorney

OFFICE OF THE CITY ATTORNEY

ERNEST H. LLORENTE
Deputy City Attorney

DIRECT DIAL: (415) 554-4236
E-MAIL: ernest.llorente@sfgov.org

MEMORANDUM

September 12, 2008

ALLEN GROSSMAN v. CITY ATTORNEY'S OFFICE (08039)

COMPLAINT

THE COMPLAINANT ALLEGES THE FOLLOWING FACTS:

On May 28, 2008, , Allen Grossman submitted a public records request to Deputy City Attorney Rosa Sanchez for copies of all public records pertaining to a letter originally dated February 26, 2007, written by Deputy City Attorney Paul Zarefsky to the Task Force members, including 1) an exact copy of the Zarefsky letter in the form given to the Task Force member at the meeting; 2) memoranda, e-mails or other communications to, from or among Ms. Sanchez and/or any one or more Deputy City Attorneys or any other persons in the City Attorney's Office or the Task Force Administrator or any other person; and 3) drafts of the Zarefsky letter and all communications between Mr. Zarefsky and/or any other Deputy City Attorneys with respect t the drafts.

Allen Grossman stated that the City Attorney's Office responded to his request as follows: To category 1) by providing a copy of the Zaresfsky letter. To category 2) by stating: "this office has records responsive to your request " for memoranda, e-mails or other communications to, from or among Ms. Sanchez and/or any one or more Deputy City Attorneys or any other persons in the City Attorney's Office or the Task Force Administrator or any other person "but declines to produce them based on the attorney work product doctrine". To category 3) by stating: "we have located a draft of the Zarefsky letter and decline to produce it based on the attorney work product doctrine" and there were no "communications between Mr. Zarefsky and and/or any other Deputy City Attorneys with respect to the drafts".

COMPLAINANT FILES COMPLAINT

On July 30, 2008, Grossman filed a complaint online and alleged that the CAO violated Sections 67.21(b) of the Sunshine Ordinance and Section 6253(b) of the California Public Records Act ("CPRA") by its alleged failure to provide the requested documents

Memorandum

JURISDICTION

Based on the allegations of the complaint and the sections of the Ordinance stated below, the Task Force has jurisdiction to hear this matter. In addition the parties in this case do not contest jurisdiction.

APPLICABLE STATUTORY SECTIONS:

1. City Administrative Code Section 67.21 addresses general requests for public documents.

2. City Administrative Code Section 67.27 addresses the justification for withholding of documents.

3. City Administrative Code Section 67.26 that states that withholding shall be kept to a minimum.

4 California Government Code Section 6253 addresses public records open to inspection.

5. California Government Code Section 6255 addresses the justification for withholding of documents...

6. California Government Code Section 6254(c) & (k) that provides for exemptions from disclosure where there is a citable privilege.

8. California Code of Civil Procedure Section 2018.030 that deals with attorney work product.

APPLICABLE CASE LAW:

The Task Force has decided two prior cases involving the City Attorney's Office and the issue of "Attorney Work Product" doctrine.

In the first case decided in June of 2003, the case involved complainant Jason Grant Garza who was in a deposition being deposed by Deputy City Attorney Scott Burrell. During the deposition, Jason Garza starting acting in a way that caused DCA Burrell to believe that Jason Garza was a threat to himself and/or others as defined in 1368 of the California Penal Code. Jason Garza was detained and later released from San Francisco General Hospital. After his release, Jason Garza requested the notes of DCA Burrell taken at the deposition. The CAO refused to release the notes based on the "Attorney Work Product" doctrine and Jason Garza filed a complaint with the Task Force. After hearing, the Task Force did not find the CAO in violation of the Sunshine Ordinance because of the "Attorney Work Product Doctrine"

In the second case decided on March 17, 2006, complainant Bob Kaufman made a public records request to Deputy City Attorney Machaela Hoctor. Bob Kaufman requested documents that record or relate to a complaint which led DCA Hoctor to threaten a civil law suit against

Universal Paragon Corporation. DCA Hoctor responded and provided redacted copies of records. Of relevance to the case currently before the Task Force is that DCA Hoctor redacted her notes written on investigative reports and cited the "Attorney Work Product" doctrine. On that issue, the Task Force did not find the CAO in violation because of that doctrine.

ISSUES TO BE DETERMINED

1. FACTUAL ISSUES

A. Uncontested Facts:

The parties agree to the following facts:

- Grossman made a request for certain public records under the control of the City Attorney's Office
- Matt Dorsey, Public Information Officer of the City Attorney's Office responded to the request.

B. Contested facts/ Facts in dispute:

The Task Force must determine what facts are true.

i. Relevant facts in dispute:

Whether the "Attorney Work Product" Doctrine is applicable to the facts of this case.

Whether the CAO has complied with the public record's request.

2. QUESTIONS THAT MIGHT ASSIST IN DETERMINING FACTS:

a.). none.

3. LEGAL ISSUES/ LEGAL DETERMINATIONS:

- **Were sections of the Sunshine Ordinance (Section 67.21 or 67.25), Brown Act, and/or Public Records Act were violated?**
- **Was there an exception to the Sunshine Ordinance, under State, Federal, or case law?**

CONCLUSION

Memorandum

THE TASK FORCE FINDS THE FOLLOWING FACTS:

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

Memorandum

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

Section 67.21 addresses general requests for public documents.

This section provides:

a.) Every person having custody of any public record or public information, as defined herein, … 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** (emphasis added) 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.

c.) A custodian of a public record shall assist a requester in identifying the existence, form, and nature of any records or information maintained by, available to, or in the custody of the custodian, whether or not the contents of those records are exempt from disclosure and shall, when requested to do so, provide in writing within seven days following receipt of a request, a statement as to the existence, quantity, form and nature of records relating to a particular subject or questions with enough specificity to enable a requester to identify records in order to make a request under (b). A custodian of any public record, when not in possession of the record requested, shall assist a requester in directing a request to the proper office or staff person.

…

k.) Release of documentary public information, whether for inspection of the original or by providing a copy, shall be governed by the California Public Records Act Government Code Section 6250 et seq.) in particulars not addressed by this ordinance and in accordance with the enhanced disclosure requirement provided in this ordinance.

Memorandum

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 inseparably intertwined with information not subject to disclosure under this ordinance. Nothing in this section shall require a department t 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.

Section 67.26 provides:

> 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.

Section 67.27 provides:

> 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 of 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.

The Attorney-Work Product doctrine is found in Section 2018.030 of the California Code of Civil Procedure. It provides:

a) A writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories is not discoverable under any circumstances.

b) The work product of an attorney, other than a writing described in subdivision (a), is not discoverable unless the court determines that denial of discovery will unfairly prejudice the party seeking discovery in preparing that party's claim or defense or will result in an injustice.

The California Public Records Act is located in the state Government Code Sections 6250 et seq. All statutory references, unless stated otherwise, are to the Government Code.

Section 6253 provides.

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 records 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 therefore....

California Government Code Section 6255 addresses the justification for withholding of documents.

Memorandum

Section 6255 provides: California Government Code Section 6255 addresses the justification for withholding of documents.

a.) The agency shall justify withholding any record by demonstrating that the record in question is exempt under express provisions of this chapter or that on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record.

b.) A response to a written request for inspection or copies of public records that includes a determination that the request is denied, in whole or in part, shall be in writing.

Allen Grossman
<grossman356@mac.com>
10/21/2008 10:40 AM

To SOTF <sotf@sfgov.org>
cc Kristin Murphy Chu <kristin@chu.com>, Ernest Llorente <Ernest.Llorente@sfgov.org>
bcc
Subject Complaint # 08039 Grossman v. City Attorney _ SOTF Meeting 10/28/08

Messrs. Darby and Rustom,

Attached is my letter dated October 20, 2008 to Chairperson Kristin Chu with reference to my Complaint #08039 versus the City Attorney.

You will note that copies of the letter are to provided all the Members of the SOTF. Accordingly, please include this letter in the portion of the SOTF meeting packet related to the agenda item for my Complaint. Since the letter raises an issue to be resolved by the SOTF before the hearing on the merits of my Complaint begins, the letter should precede the other documents included in the packet with respect to the agenda item.

A copy of the attached letter is being sent to Mr. Llorente by copy of this email.

Please contact me immediately if you have any question regarding the foregoing.

Thank You,

Allen Grossman


Ltr Chair SOTF 102008.pdf

Allen Grossman
111 30th Avenue
San Francisco, CA 94121-1005
Tel: (415) 831-3720
Fax: (415) 831-3721
Email: grossman356@mac.com

October 20, 2008

Honorable Kristin Chu, Chair
Sunshine Ordinance Task Force
Room 244, City Hall
San Francisco, CA 94102

Re: Complaint # 08039 – Allen Grossman v. City Attorney's Office

Dear Chairperson Chu;

The subject complaint is scheduled to be heard at the next full SOTF meeting. When it is called, I plan to ask Mr. Llorente to recuse himself as the assigned Deputy City Attorney because of his conflict of interest and his personal bias toward me. Last Wednesday, October 15, I sent him a Personal and Confidential letter making that request. The letter explained why I believed he is biased and cannot be objective when advising the SOTF with reference to my complaint. I asked him to advise me, by last Friday, the 17th, whether he would or would not do that, so that if chose not to, I could submit something to the SOTF members in advance of the meeting. I added that if I didn't hear from him, I would assume he did not plan to do so. As has been his custom in the past with regard to my letters, he did not reply.

Two principal reasons for my request were - as stated in the letter:

> "[Mr. llorente's] Instructional Letter of September 12, 2008:
>
> "There were two obvious omissions in [his] September 12, 2008 "Instructional Letter" that favored the City Attorney's position. First, [he] ignored the threshold whether the "work product doctrine" – the exemption claimed by the City Attorney - even applies to the public records requested; and second, [he] omitted the SOTF case involving the "work product doctrine" heard by the SOTF in March 2008 favorable to my position.
>
> "As for the first omission, [he] neither referred to nor discussed the two basic sections of the Sunshine Ordinance applicable to the records in question in the Complaint, Sections 67.24(b)(1)(ii) and (iii), event though both these sections were referred to in the attachment to the Complaint. As a result of [his] failure to take up these two sections, [his] entire "Instructional Letter" was devoted to the City Attorney's claim that the records are exempt under the work product doctrine. Even though my Complaint in no way rested on the inapplicability of the work product exemption, [he] described two SOTF past cases in which the work product doctrine was applied, the inference being that the doctrine also applies to the records I sought. Just looking at the facts of those two cases, it was clear that they were not even close on the "work product" claim asserted by the City Attorney on the facts in my Complaint.

"The omission from [his] "Instructional Letter" of what may be the most recent SOTF case involving the "work product doctrine" heard in March 2008 is an indicator of a predilection in favor of the City Attorney. That case involved a records request to the City Attorney's Office for all materials related to meetings that a DCA had with two Supervisors regarding hearings before the SOTF. The City Attorney's Office redacted certain information from emails claiming both the attorney-client privilege and the work product doctrine. In its Order of Determination, the SOTF found that "Sections 67.21(i) and 67.24(b)(1)(iii) to be applicable ... with respect to the impermissible redactions being based on attorney client privilege and work product protection." That case was not only recent but directly on point. Yet, as noted below, [he] claim[ed] to have a database of all the decided SOTF cases. "

"The September 11, 2008 Education, Outreach & Training Committee Meeting:

"At that meeting, [Mr. Ilorente] used my yet unheard Complaint (without naming it) as an example of how prior decided SOTF cases could be used by the SOTF to decide a current one. Unfortunately the "history" [he] provided the Committee was faulty and demonstrated [his] ties to the City Attorney's office. Toward the end of the meeting, [he] mentioned that [he] had been working on a memorandum researching two prior cases involving the City Attorney that involved work product "decided two years and four years ago" on similar issues for inclusion in [his] instructional letter to the SOTF - obviously on my Complaint, as [his] Instructional Letter was dated the next day, September 12, 2008; that sometimes "people" don't understand the "concept of work product as used in the City Attorney's office", although you [the SOTF] have an attorney "who tells you [the SOTF] that you don't understand [how it operates]; that "here you have two live cases where it was decided" how to use "work product"; "that I have all the cases in my data bank" ; "that is the only case law we have other than two Chaffee cases litigated in the court of appeals cases"; and "those are the only two cases for precedent we have and whether you follow them is up to you".

"There is no need to speculate whether [he] inadvertently or intentionally failed to include the most recent SOTF case involving work product in your database or missed finding it there. Only [he] know[s] that. The fact is [he was] arguing the City Attorney's case before several SOTF members without my being present. What does that say about where [he] positions [himself] when there is a potential conflict of interest regarding my Complaint – which there clearly is – even if, giving [him] the benefit of the doubt, [he] didn't realize [he was] doing it."

At the meeting, I believe it appropriate that the SOTF decides whether Mr. Ilorente should be its "advisor" when my complaint is heard. Not only is the SOTF charged with making that decision under Section 60.30(a) of the Sunshine Ordinance, but the issue of his conflict of interest has now become one of signal importance what with Mr. Herrera's recent letter limiting Mr. Llorente's time so that he can advise other City departments or agencies.

Thank you in advance for your consideration.

Very Truly Yours,

Allen Grossman

Allen Grossman

CC: SOTF Members
Ernest Ilorente, Esq.

Allen Grossman
111 30th Avenue
San Francisco, CA 94121-1005
Tel: (415) 831-3720
Fax: (415) 831-3721
Email: grossman356@mac.com

October 15, 2008

Honorable Members
Sunshine Ordinance Task Force
Room 244, City Hall
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102

Re: Complaint # 08039 – Allen Grossman v. City Attorney's Office

Dear Task Force Members;

This letter responds to the City Attorney's September 16, 2008 letter with reference to the subject Complaint except for that part captioned "No Duty to Identify Records Withheld" that begins on page 3 and ends on the last page. That whole portion is irrelevant because my Complaint does not allege that the City Attorney violated Section 67.21(c) of the Sunshine Ordinance – the section that deals with assistance in identifying public records. The Complaint only alleges violations of Section 67.21(b) and CPRA 6253(b).

Regarding the portion of the letter captioned "No Duty to Produce Attorney Work Product",

First, the City Attorney cites and quotes from the City Attorney's own-authored current *Good Government Guide*, which merely expresses the City Attorney's "view" that the work product doctrine applies in these situations. Of course, the City Attorney does not have the final say on the subject when it comes to the administration of the Sunshine Ordinance. That is the role of the SOTF; it makes that determination, as is provided in Section 67.21(e) of the Sunshine Ordinance. As noted below, the SOTF has ruled that the City Attorney is wrong on this subject because of its misplaced reliance on CPRA §6254(k).

Second, the City Attorney next contends that Sections 67.24(b) (1) (ii) and (iii) do not apply. Section 67.24(b)(1) clearly was intended to do away with "any exemptions otherwise provided by law" in certain instances. The key words being: "any exemptions".

Applicability of Section 67.24(b)(1)(ii)

Among the categories of public records stripped of any exemption by that section is a record received or created by a department "in the ordinary course of business that was not attorney/client privileged when it was previously received or created." [§67.24(b)(1)(ii)] The City Attorney does not claim that any of the requested records were not created in "the ordinary course of business" or that they were "attorney-client privileged when received or created." He just claims that one or both of two privileges "typically" cover them, without actually connecting the undisclosed records to either of the privileges. There is no indication in the following quotation from the City Attorney's letter that the

records in question were not created or received in the ordinary course of business:

> "... the members of this office create and obtain records in the performance of our duties that are typically covered by the attorney-client privilege and/or the attorney work product doctrine at the time those records are obtained or created. For example, if an attorney in this office prepares memorandum, it constitutes work product at the time it is created. Because the records withheld by this office in response to the complainant's request are protected - and have always been protected - by the work product doctrine, the provisions of Section 67.24(b)(1)(ii) do not apply."

Applicability of Section 67.24(b)(1)(iii)

The City Attorney next questions whether this section "applies to the attorney's work product". The section states:

> "(b) (1) **Notwithstanding any exemptions otherwise provided by law,** the following are public records subject to disclosure under this Ordinance:
>
> (iii) **Advice on compliance with, analysis of, an opinion concerning liability under, or any communication otherwise concerning the California Public Records Act,** the Ralph M. Brown Act, the Political Reform Act, any San Francisco governmental ethics code, **or this Ordinance.**"

According to the City Attorney:

> "**Section 67.24(b)(iii) makes no reference to an attorney's work product.** The protections afforded the attorney work product arise under State law and are expressly incorporated in the Public Records Act (Cal. Gov. Code §6276.01). **The absence of any reference to work product compels the conclusion that the Sunshine Ordinance did not intend to require the disclosure of records that constitute work product."** (Emphasis Added)

This assertion that the section had to refer specifically to "attorney's work product" to apply is novel, to say the least. It negates the meaning of the capitalized lead-in of the section: "**Notwithstanding any exemptions otherwise provided by law".** That meaning is clear: When it comes to the City Attorney's written public records that embrace the open government laws, whether they are communications, opinions or analyses, no exemption applies to them, least of all the so-called work product doctrine. The SOTF has consistently found that the attorney-client privilege – one that is more zealously protected than the work product doctrine - does not apply to these records and the City Attorney has not advised any department or agency for some time that its communications with them, which often include work product, are exempt.

Thus, in a case involving the "work product doctrine" decided by the SOTF in March 2008, a records request to the City Attorney's Office asked for all materials related to meetings that a DCA had with two Supervisors regarding hearings before the SOTF. The City Attorney's Office redacted certain information from emails claiming both the attorney-client privilege and the work product doctrine.

In its Order of Determination, the SOTF found that "Sections 67.21(i) and 67.24(b)(1)(iii) to be applicable ... with respect to the impermissible redactions being based on attorney client privilege and work product protection." [and] "**These specific statutory enactments prevail over any other**

applicable state law protection, including Cal. Govt. Code § 6254(k), pursuant to the terms of the Sunshine Ordinance and the California Public Records Act. See § 67.24 (providing "enhanced right of public access to information and records"); Cal. Govt. Code § 6253(e)." (Emphasis added). That case is directly on point with the one now before you.

Nevertheless, ignoring my position that the exemption does not apply at all, the City Attorney then states that:

> "But, the complainant argues, this office may not rely on the work- product privilege because that exception is limited to records prepared in anticipation of litigation and at the direction of counsel. There is no such limitation. 'The protection afforded by the privilege is not limited to writings created by a lawyer in anticipation of a lawsuit. It applies as well to writings prepared by an attorney while acting in a non litigation capacity.' (Citation omitted)"

I made no such argument in the Complaint or any attachments to it. Even so, without knowing the content of the records withheld, there is no way one can determine whether those records, absent the application of Section 67.24(b)(iii), would be subject to either the "litigation" work product exception or the "conditional" or "qualified" work product exception. All we have is the City Attorney's assertion that one or the other is implicated.

It should be noted that absent the existence of Section 67.24(b)(1)(iii), the California Attorney General described the "work product exemption" in the Summary of the California Records Act (2004), as follows:

> "The attorney work product rule covers research, analysis, impressions and conclusions of an attorney. **This confidentiality rule** appears in section 2018 of the Code of Civil Procedure and **is incorporated into the CPRA through section 6254(k).** Records subject to the rule are confidential forever. The rule applies in litigation and nonlitigation circumstances alike. (Footnote reference omitted)"

However, that question of a qualified versus absolute rule is moot under the Sunshine Ordinance, as the SOTF concluded in its determination letter quoted above:

> "**These specific statutory enactments prevail over any other applicable state law protection, including Cal. Govt. Code § 6254(k),** pursuant to the terms of the Sunshine Ordinance and the California Public Records Act."

The Sunshine Ordinance recognizes that there is simply no room for any secret documents containing the City Attorney's advice, analyses, opinions or communications when it comes to the public records laws.

Very Truly Yours,

Allen Grossman.

Allen Grossman

Allen Grossman
111 30th Avenue
San Francisco, CA 94121-1005
Tel: (415) 831-3720
Fax: (415) 831-3721
Email: grossman356@mac.com

September 18, 2008

Honorable Members
Sunshine Ordinance Task Force
Room 244, City Hall
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102

Re: Complaint # 08039 – Allen Grossman v. City Attorney's Office

Dear Task Force Members;

The subject complaint is scheduled to be heard at your September 23, 2008 meeting. The meeting "package" includes the documents relevant to that complaint filed with the SOTF Administrator prior to last Tuesday, September 16, 2008. Included is the Deputy City Attorney's Instructional Letter to the Complaint Committee/Task Force - Mr. Llorente's Memorandum dated September 12, 2008. As I did receive a copy of his "Instructional Letter" until late Tuesday, this letter could not be in the package.

The threshold issue in this matter is whether the "work product doctrine" – the exemption claimed by the City Attorney - even applies to the public records requested. Mr. llorente's "Instructional Letter" inexplicably ignores that issue. He does not refer to or discuss the two basic sections of the Sunshine Ordinance applicable to the records in question, Sections 67.24(b)(1)(ii) and (iii), to wit:

> "(b) (1) Notwithstanding any exemptions otherwise provided by law, the following are public records subject to disclosure under this Ordinance:
>
> (ii) A record previously received or created by a department in the ordinary course of business that was not attorney/client privileged when it was previously received or created;
>
> (iii) Advice on compliance with, analysis of, an opinion concerning liability under, or any communication otherwise concerning the California Public Records Act, the Ralph M. Brown Act, the Political Reform Act, any San Francisco governmental ethics code, or this Ordinance."

Both these sections were referred to in the attachment to the Complaint, as follows:

> "Complainant then advised Mr. Dorsey that **under paragraphs (ii) and (iii) of Section 67.24 (b)(1), the applicable provisions of the Sunshine Ordinance, neither the work product rule or any other "exemption" can apply to withheld public records**... " (Emphasis added)

As a result of his failure to take up these two sections, the entire "Instructional Letter" is devoted to the City Attorney's claim that the records are exempt under the work product doctrine. However, to put

Mr. Ilorente's review in perspective and as the City Attorney will argue the work product doctrine at the hearing, it is necessary to respond to it here. Mr. Ilorente cites and quotes Code of Civil Procedure Section §2018.030, but does not discuss it. Instead he describes two SOTF past cases in which the work product doctrine was applied, the inference being that the doctrine also applies to the records I sought. He is mistaken.

Neither of the two prior SOTF cases he describes involved public records that fell within either of Sections 67.24(b) (1) (ii) and (iii) cited above. The first involved notes taken by a DCA at a deposition of the complainant. The other involved a DCA's redaction of her notes on public records regarding the DCA's threat to sue a corporation, presumably the client of the complainant.

Oddly missing from Mr. Ilorente's "Instructional Letter" is a SOTF case involving the "work product doctrine" decided just six months ago. In that case, heard by the SOTF in March 2008, a records request to the City Attorney's Office asked for all materials related to meetings that a DCA had with two Supervisors regarding hearings before the SOTF. The City Attorney's Office redacted certain information from emails claiming both the attorney-client privilege and the work product doctrine.

In its Order of Determination, the SOTF found that "Sections 67.21(i) and 67.24(b)(1)(iii) to be applicable ... with respect to the impermissible redactions being based on attorney client privilege and work product protection." [and] **"These specific statutory enactments prevail over any other applicable state law protection, including Cal. Govt. Code § 6254(k), pursuant to the terms of the Sunshine Ordinance and the California Public Records Act. See § 67.24 (providing "enhanced right of public access to information and records"); Cal. Govt. Code § 6253(e).**" (Emphasis added). That case is directly on point with the one now before you.

Finally, even if sections 67.24(b)(1) (ii) and (iii) were somehow found not to apply, the attorney work product doctrine does not either. The reasons are spelled out in my two letters (in the meeting package), one to Mr. Matt Dorsey dated November 22, 2006 and the other to Mr. Paul Zarefsky dated December 19, 2006.

Very Truly Yours,

Allen Grossman

Allen Grossman

07-30-2008 RCVD

SUNSHINE ORDINANCE TASK FORCE
1 Dr. Carlton B. Goodlett Place, Room 244, San Francisco CA 94102
Tel. (415) 554-7724; Fax (415) 554-7854
http://www.sfgov.org/sunshine

SUNSHINE ORDINANCE COMPLAINT

Complaint against which Department or Commission OFFICE OF CITY ATTORNEY
Name of individual contacted at Department or Commission MATT DORSEY, ROSA SANCHEZ, ALEXIS THOMPSON

X Alleged violation public records access
____ Alleged violation of public meeting. Date of meeting _____

Sunshine Ordinance Section 67.21(b), CPRA § 6253(b)
(If known, please cite specific provision being violated)

Please describe alleged violation. Use additional paper if needed. Please attach any relevant documentation supporting your complaint.
SEE ATTACHED DOCUMENTATION

Do you wish a public hearing before the Sunshine Ordinance Task Force? X yes ____ no.

(Optional)[1]
Your name ALLEN GROSSMAN Address 111 30TH AVENUE
SAN FRANCISCO, CA 94121 Date JULY 30, 2008

Telephone (415) 831-3720 If anonymous, please let us know how to contact you.
EMAIL; GROSSMAN35@MAC.COM
Signature Allen Grossman

[1] NOTICE: PERSONAL INFORMATION THAT YOU PROVIDE IS SUBJECT TO DISCLOSURE UNDER THE CALIFORNIA PUBLIC RECORDS ACT AND THE SUNSHINE ORDINANCE, EXCEPT WHEN CONFIDENTIALITY IS SPECIFICALLY REQUESTED. COMPLAINANTS CAN BE ANONYMOUS AS LONG AS THE COMPLAINANT PROVIDES A RELIABLE MEANS OF CONTACT WITH THE SOTF (PHONE NUMBER, FAX NUMBER, OR E-MAIL ADDRESS).

05/26/06

July 30, 2008

The Office of the City Attorney and Matt Dorsey, its Public Information Officer and its claimed "custodian of records" (together, the "Respondents") violated Section 67.21(b) of the Sunshine Ordinance and Section 6253(b) of the California Public Records Act in connection with Complainant's Public Records Request dated May 28, 2008.

Summary:

Complainant submitted a request to Deputy City Attorney Rosa Sanchez for copies of all public records pertaining to a letter (originally) dated February 26, 2007 written by Paul Zarefsky, a Deputy City Attorney, to the SOTF members (the "Zarefsky Letter"), including (1) an exact copy of the Zarefsky Letter in the form given to the SOTF members at the meeting; (2) memoranda, emails or other communications to, from or among Ms. Sanchez and/or any one or more Deputy City Attorneys or any other persons in the City Attorney's Office or the SOTF Administrator or any other person; and (3) drafts of the Zarefsky Letter and all communications between Mr. Zarefsky and/or any other Deputy City Attorneys with respect to the drafts. Attachment #1.

Respondents responded as follows:

To category (1) by providing a copy of the Zarefsky Letter;

To category (2) by stating: "this office has records responsive to your request" for memoranda, emails or other communications to, from or among Ms. Sanchez and/or any one or more Deputy City Attorneys or any other persons in the City Attorney's Office or the SOTF Administrator or any other person "but declines to produce them based on the attorney work product doctrine";

To category (3), by stating: "we have located a draft of the [Zarefsky] letter and decline to produce it based on the attorney work product doctrine" and there were no "communications between Mr. Zarefsky and/or any other Deputy City Attorneys with respect to the drafts".

Complainant then advised Mr. Dorsey that under paragraphs (ii) and (iii) of Section 67.24 (b)(1), the applicable provisions of the Sunshine Ordinance, neither the work product rule or any other "exemption" can apply to withheld public records; and that as the original records request was made on June 16, 2008 and he had already determined what records his office would have provided but for the claim of an inapplicable exemption, he should provide those records in the next day or two – that is on July 22 or July 23, 2008.

As of the date of this Complaint, Complainant has not received any of the requested public records in Mr. Dorsey's custody.

For a chronology and description of the parties' actions, see Attachment #2

Attachment #1

From: Allen Grossman <grossman356@mac.com>
Date: May 28, 2008 5:23:05 PM PDT
To: rosa.sanchez@sfgov.org
Cc: Alexis Thompson <Alexis.Thompson@sfgov.org>
Subject: SOTF Meeting May 27, 2008

Miss Sanchez,

This is a public records request pursuant to Section 67.27(b) of the San Francisco Sunshine Ordinance and Section 6253(b) of the California Public Records Act and any other applicable provisions of California Public Records Act and the San Francisco Sunshine Ordinance for copies of all public records relating or with respect to, or in connection with, the letter (originally) dated February 26, 2007 written by Paul Zarefsky to the members of the SOTF (the "Zarefsky Letter") in response to a letter I had written them dated February 12, 2007 regarding Complaint #07006, copies of which you handed out to the members at the time Agenda Item #3 at the SOTF meeting was to be heard, including, without limitation,

(1) An exact copy of the Zarefsky Letter in the form given to the SOTF members at the meeting;

(2) Memoranda, emails or other communications to, from or among you and/or any one or more Deputy City Attorneys or any other persons in the City Attorney's Office or the SOTF Administrator or any other person; and

(3) Drafts of the Zarefsky Letter and all communications between Mr. Zarefsky and/or any other Deputy City Attorneys with respect to the drafts.

If such records are kept electronically or in PDF format, please send them in their original format by email to my above email address. If the records are kept in some other format, please scan the relevant page(s) to PDF format and send them by email to my email address: grossman356@mac.com. Please call me at 415-831-3720, if you have any question regarding this request.

Please acknowledge receipt of this request.

Thank You,

Allen Grossman,
111 30th Avenue
San Francisco, CA 94121

Attachment #2

Chronology of Public Records Request and parties' actions:

At the May 27, 2008 SOTF meeting, when Agenda Item #3 was to be heard Rosa Sanchez, the Deputy City Attorney assigned to the SOTF for that meeting, distributed to the SOTF members, a letter (originally) dated February 26, 2007 written by Paul Zarefsky, a Deputy City Attorney, to the SOTF members (the "Zarefsky Letter"). The Zarefsky Letter was a response to the Complainant's February 12, 2007 letter to the SOTF members regarding Complaint #07006.

On May 28, 2008, by email to Miss Sanchez, Complainant requested copies of all public records pertaining to the Zarefsky Letter, including, (1) an exact copy of the Zarefsky Letter in the form given to the SOTF members at the meeting; (2) memoranda, emails or other communications to, from or among Ms. Sanchez and/or any one or more Deputy City Attorneys or any other persons in the City Attorney's Office or the SOTF Administrator or any other person; and (3) drafts of the Zarefsky Letter and all communications between Mr. Zarefsky and/or any other Deputy City Attorneys with respect to the drafts.

On June 3, 2008, Alexis Thompson, the then Deputy Press Secretary, responded to each of the three "included" categories. As to (1) by forwarding a "scanned " copy of the Zarefsky Letter; as to (2) by asking that Complainant "clarify to us the second part of your request for "Memoranda, emails or other communications to, from or among you and/or any one or more Deputy City Attorneys or any other persons in the City Attorney's Office or the SOTF Administrator or any other person..." suggesting that "in its current form, we believe that the range of information that you have asked for is over-broad."; and as to (3) by withholding "any drafts pertaining to [the] request on the basis of the attorney work product doctrine" and that there are no documents responsive to your request for "communications between Mr. Zarefsky and/or any other Deputy City Attorneys with respect to the drafts."

On June 25, 2008, Complainant was further advised by Mr. Dorsey "this office has records responsive to your request" for "[m]emoranda, emails or other communications to, from or among ..." regarding the Zarefsky Letter but declines to produce them based on the attorney work product doctrine" and that "we have located a draft of the [Zarefsky] letter and decline to produce it based on the attorney work product doctrine."

On June 30, 2008 Complainant advised Mr. Dorsey that his response did not identify the specific "[m]emoranda, emails or other communications ...", being withheld "based on the work product doctrine"; that in accordance with Section 67.21(c) of the Sunshine Ordinance he was to provide me, by email or facsimile, a statement identifying the "memoranda, emails or other communications" that meet the requirements of Section 67.21(c); and that after I have that statement, I would consider the City Attorney's claimed basis for withholding those public records and the draft of Mr. Zarefsky's February 26, 2007 letter.

On July 7, 2008 Mr. Dorsey replied, relying on a California Supreme Court decision, that "we have no duty under the California Public Records Act to provide the information that you request" nor was there any in the Sunshine Ordinance.

On July 21, 2008, Complainant wrote Mr. Dorsey that "[a]fter further review of the applicable provisions of the Sunshine Ordinance, specifically paragraphs (ii) and (iii) under Section 67.24 (b)(1), I have concluded that there is no reason to have any of the withheld public records identified, as neither the work product rule or any other "exemption" can apply to them. Each is a record "previously ...created by a department in the ordinary course of business that was not attorney/client privileged when it was ...created" as well as "[a]dvice on compliance with, analysis of, an opinion concerning liability under, or any communication otherwise concerning

the California Public Records Act, or [the Sunshine] Ordinance." Paragraphs (ii) and (iii) also apply to the draft of Mr. Zarefsky's letter being withheld." Complainant further advised him that as Complainant's "original records request was made on June 16, 2008; and that he "already determined what records your office would have provided me but for your claim of an inapplicable exemption, please provide those records to me in accordance with my original request in the next day or two."

ALLEN GROSSMAN.
111 30th AVENUE
SAN FRANCISCO, CALIFORNIA 94121-1005
TELEPHONE: (415) 831-3720
FACSIMILE: (415) 831-3721
E-MAIL: grossman356@mac.com

FACSIMILE TRANSMITTAL

To:	Frank Darby, Administrator
Of:	Sunshine Ordinance Task Force
FAX Number:	(415) 554-7854
Phone Number:	(415) 554-7724
Number of Pages:	6, including cover sheet
Date:	July 30, 2008
From:	Allen Grossman
Message:	Attached is my complaint dated today against the Office of the City Attorney and Matt Dorsey, its Public Information Officer. Please acknowledge (by email or facsimile) that it has been receive. Also, please advise me (a) of the number assigned to the Complaint, (b) whether the complaint will be heard by the SOTF at its next scheduled meeting, Tuesday August 26, 2008, (c) the date you notify the Office of the City Attorney of the Complaint and (d) whether you receive a response from the Office of the City Attorney and Mr. Dorsey within the five business day period required under the Complaint Procedure. Thank You.

IF YOU DO NOT RECEIVE ALL PAGES OF THIS TRANSMISSION,
PLEASE CALL (415) 831-3720 AS SOON AS POSSIBLE

Allen Grossman
<grossman356@mac.com>
Sent by:
grossman356@mac.com

07/31/2008 03:27 PM

To SOTF <sotf@sfgov.org>

cc Kimo Crossman <kimo@webnetic.net>

bcc

Subject Re: Sunshine Complaint Received: #08039_Alan Grossman vs City Attorney's Office

Mr. Rustom,

As you know, my first name is spelled"Allen". No harm, no foul, however.

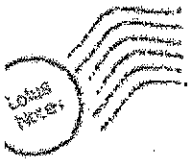
In any case, since I did not ask for any confidentiality, why did you redact my address telephone number and email address? In fact, I prefer that other persons who may have some interest in my complaint could contact me. Please explain.

Thank You.

Allen Grossman

On Jul 31, 2008, at 3:13 PM, SOTF wrote:

> This e-mail is to confirm that the attached complaint and support documents have been received. The Department is required to submit a response to the charges to the Task Force within five business days of receipt of this notice. Please refer to complaint number #08039 when submitting any new information and/or supporting documents pertaining to this complaint.
>
> If the Department contests jurisdiction or if the parties request a prehearing conference a hearing will be scheduled with the Complaint Committee of the Sunshine Ordinance Task Force who will determine whether the Task Force has jurisdiction over this matter, and/or to focus the complaint or to otherwise assist the parties to the complaint.
>
> Date: Tuesday, September 9, 2008
> Location: City Hall, Room 406
> Time: 4:00 P.M.
>
> If the Department does not contest jurisdiction or if the parties don't request a prehearing conference a hearing will be scheduled with the full Sunshine Ordinance Task Force who will hear the merits of the complaint and issue a determination.
>
> Date: Tuesday, August 26, 2008
> Location: City Hall, Room 408
> Time: 4:00 P.M.
>
> Complainants: Your attendance is required at this meeting/hearing.
>



Matt
Dorsey/CTYATT@CTYATT
08/06/2008 02:36 PM

To SOTF/SOTF/SFGOV@SFGOV, Frank Darby/BOS/SFGOV@SFGOV
cc
bcc
Subject Complaint No. 08039: Alan Grossman vs. City Attorney's Office

Honorable Members
SUNSHINE ORDINANCE TASK FORCE
c/o Frank Darby, Jr.
Room 244, City Hall
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102

Re: Complaint No. 08039 - Alan Grossman vs. City Attorneys Office

Dear Honorable Task Force Members:

This office does not dispute the jurisdiction of the Sunshine Ordinance Task Force over this complaint.

We believe that the complaint is without merit and will provide a response on the merits.

Best,
MATT DORSEY
Public Information Officer

OFFICE OF CITY ATTORNEY DENNIS HERRERA
San Francisco City Hall, Room 234
1 Dr. Carlton B. Goodlett Place
San Francisco, California 94102-4682

(415) 554-4662 Direct
(415) 554-4700 Reception
(415) 554-4715 Facsimile
(415) 554-6770 TTY

http://www.sfgov.org/cityattorney/

Allen Grossman
<grossman356@mac.com>
09/15/2008 11:16 AM

To SOTF <sotf@sfgov.org>
cc
bcc
Subject Complaint #08039 Allen Grossman v. City Attorney

Mr. Darby,

Please include the attached two letters, one to Mr. Matt Dorsey dated November 22, 2006 and the other to Mr. Paul Zarefsky dated December 19, 2006, in the "package" related to the agenda item for the September 23, 2008 SOTF meeting with reference to the subject complaint.

Thank You,

Allen Grossman


Ltr Dorsey SF Cty Atty 112206.pdf


Ltr Zarefsky (Work Product Content) 121906.pdf

Allen Grossman
111 30th Avenue
San Francisco, CA 94121-1005
Tel: (415) 831-3720
Fax: (415) 831-3721
Email: grossman356@mac.com

BY FACSIMILE

November 22, 2006

Mr. Matt Dorsey
Public Information Officer
Office of the City Attorney
City Hall, Room 234
San Francisco, CA 94102-4682

Re: November 3, 2006 Immediate Disclosure Request

Dear Mr. Dorsey:

In your last minute November 17, 2006 response to my records request, you stated that:

> "Not provided are records that constitute the work product of an attorney, which is protected protected from disclosure under California Code of Civil Procedure § 2018".

That statement is not a sufficient basis for refusing to provide the requested public records. A two-step process is involved before that privilege may be invoked, as your Office will no doubt confirm:

First, the CAO must satisfy the rule expressed in 2 Witkin Cal. Evid. 4th Witnesses §143, at page 403, that "Counsel must do more than merely state that something is protected by the **work product** rule: 'The burden is upon him to prove the preliminary facts to show that the privilege applies.' (Citations omitted)" and noted in *Mize v. Atchison, T. & S. F. Ry. Co.* (1975) 46 Cal.App.3d 436. 488, when it said:

> "...It is not enough that he merely state that something is either work product or within the lawyer-client privilege. The burden is upon [counsel] to prove the preliminary facts to show that the privilege applies. (Citations Omitted)", and

Second, the work product privilege is not absolute bar to disclosure, but rather is conditional. As was stated by the court in *National Steel Products Co. v. Superior Court (Rosen)* (1985) 164 Cal.App.3d 476, 492:

> "The work product privilege is conditional as it relates to the...report; therefore, "... good cause normally must be shown to compel discovery of [that report]..." (Citation omitted) More specifically, "[t]he work product of an attorney shall not be discoverable unless the court determines that denial of discovery will unfairly prejudice the party seeking discovery ... or will result in an injustice," (Code Civ. Proc., § 2016, subd. (b).)"

Because CCP § 2018.030 is couched in terms associated with litigation, the exact text does not fit within the scope of a public records request. However, it is undeniable that the a public records request must be viewed as having a broader scope precisely because there is no adversary proceeding involved; there is no need for a

Court to determine whether the discovery (disclosure) will "unfairly prejudice the party seeking the discovery (disclosure) or will result in an injustice."

No argument can be made by your Office that the disclosure of any of the requested public records that your Office claims are "protected" will not "unfairly prejudice" me, as the requester, or will not result in an "injustice". Quite the opposite. The failure to provide them will unfairly prejudice me, as member of the public, and will result in an injustice. The right of the public to know on what basis and by what rigorous process formal published opinions are issued by public officials charged with that responsibility could not be more obvious. One only need look at the websites of the Attorneys-Generals of the States of Washington and Ohio, both of which reflect their recognition of the public's interest in that process by describing in some detail the process each follows.

Proposition 59 dictates:

> "(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, shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access. "

In addition your statement regarding the "protected" records must be read in conjunction with Section 67.21(c) of the San Francisco Sunshine Ordinance provides, in part, that:

> "A *custodian of a public record* shall assist a requester in identifying the existence, form, and nature of any records or information maintained by, available to, or in the custody of the custodian, whether or not the contents of those records are exempt from disclosure and shall, when requested to do so, provide in writing within seven days following receipt of a request, a statement as to the existence, quantity, form and nature of records relating to a particular subject or questions with enough specificity to enable a requester to identify records in order to make a request under (b)."

Thus your Office is obligated to meet both the general requirements applicable to the invocation of the work product privilege and the specific requirements of Section 67.21(c) before the claimed work product privilege can be invoked with respect to any public record in its or your custody.

Accordingly, within seven (7) days please provide me, by email, with a statement as to the existence, quantity, form and nature of these "protected" records with enough specificity to enable me to identify them in order to make a more specific request under Section 67.21(b) of the Sunshine Ordinance, if needed.

Very Truly Yours

Allen Grossman

Cc: Paul Zarefsky, Esq.

Allen Grossman
111 30th Avenue
San Francisco, CA 94121-1005
Tel: (415) 831-3720
Fax: (415) 831-3721
Email: grossman356@mac.com

December 19, 2006

BY FACSIMILE

Paul Zarefsky, Esq.
Deputy City Attorney
City Hall, Room 234
San Francisco, CA 94102-4682

Re: November 3, 2006 Immediate Disclosure Request

Dear Mr. Zarefsky:

This letter replies to Mr. Dorsey's November 29, 2006 email, which I received by facsimile on December 5, 2006. With his email Mr. Dorsey also sent by facsimile an 11-page document captioned "Procedures and Guidelines For Issuing City Attorney Opinions" dated November 5. 2005. He advised me that the document was the only record withheld in response to my original request.

As you know, that document is heavily redacted on pages 1, 2, 4, 8 and 9 on the claimed basis that the redacted portions are subject to the "work product privilege Cal. Code Civ.Pro. §2018.030" that was "properly cited" in your November 17 letter. The first sentence of the document reads: "This memorandum sets forth the **policy** of the City Attorney's Office for preparing and issuing legal opinions." (Emphasis mine.) The second sentence of the third paragraph states: "This **policy** is organized in four main parts:" – items (1) and (3) are redacted. (Emphasis mine) Viewing the redactions as a whole, one detects the careful attempt to hide the general subject matter of the portions redacted. Even the entire checklist on the Opinion Cover Sheet form was redacted. It is not much of a leap to assume that the redacted text relates to the two redacted "main parts" of the four-part "policy" described in the second sentence. There is no indication as what is the general nature of the redacted text, even in the case of the text on page 4 that appears to spell out some special treatment for advice or opinions on Sunshine laws – notwithstanding that the opinions themselves are not exempt from disclosure under §67.21(i) of the San Francisco Sunshine Ordinance.

Using comparisons to procedures followed by each Attorney General in the States of Washington and Ohio, as posted on their respective websites, copies of which are appended to this letter, it appears likely that the two missing main parts relate to the procedure for researching, critiquing, reviewing and finally vetting the opinion for issuance and publication. To claim that some parts of a document setting forth a policy for the preparation and issuing of legal opinions are uniquely "work product" and the other parts are not is not tenable. Either the policy is as a whole is work product or it is not. In this case it is not.

Policies are generic in that they apply prospectively to actions to be taken that fall within the purview of the policy's parameters. The particular policy set forth in the document describes how some future legal work product, i.e., an opinion of the City Attorney, is to be created, but the policy itself is not "work product." To take it further, it is no more work product in that policy than in any other policy that the City Attorney has in place regarding the conduct of its professional responsibilities to it clients or to the public. For example, the City Attorney probably has a policies regarding conflicts of interest, filing of and brief preparation for appeals to appellate courts, for processing claims filed against the city or in-house training of newly hired lawyers (on issues unique to a public office). None of these policies involve work done in relation to a particular client. In sum, the work product rule does not apply to policies.

In addition, under Section 67.24(a)(1) no "department memorandum" is exempt from disclosure under CPRA Section 6254(a) or "under any other provision" and under Section 67.24(b)(1), notwithstanding any exemptions otherwise provided by law, the following are public records subject to disclosure ... "(ii) A record previously ...created by a department in the ordinary course of business that was not attorney/client privileged when it was ...created." Both these provisions apply to the memorandum.

There is also a serious question whether Section 6254(k) of the California Public Records Act applies to the memorandum as a public record or, for that matter, to any public record other than one covered by the absolute work product privilege. That section refers to "[R]ecords, the disclosure of which is exempted or prohibited pursuant to federal or state law, including but not limited to, provisions of the Evidence Code relating to privilege." The work product rule, as codified in Code Civ. Pro. §2018.030, is two separate litigation discovery rules. One is the so-called "absolute" (no discovery) rule in subsection (a) referring to a "writing" that reflects the lawyer's impressions, conclusions, etc. The other rule is conditional or "qualified". As explained in my November 22, 2006 letter, citing *National Steel Products Co. v. Superior Court (Rosen)* (1985) 164 Cal.App.3d 476, 492:

> 'The work product privilege is conditional as it relates to the...report; therefore, "... good cause normally must be shown to compel discovery of [that report]..." (Citation omitted) More specifically, '[t]he work product of an attorney shall not be discoverable unless the court determines that denial of discovery will unfairly prejudice the party seeking discovery ... or will result in an injustice,' (Code Civ. Proc., § 2016, subd. (b).)'"

Thus, the disclosure of the record here is neither exempted nor prohibited. It is merely a potentially discoverable document in a lawsuit. This is even more apparent when, as said in my November 22, 2006 letter,

> "[I]t is undeniable that the a public records request must be viewed as having a broader scope precisely because there is no adversary proceeding involved; there is no need for a Court to determine whether the discovery (disclosure) will "unfairly prejudice the party seeking the discovery (disclosure) or will result in an injustice."
>
> "No argument can be made by your Office that the disclosure of any of the requested

public records that your Office claims are "protected" will not "unfairly prejudice" me, as the requester, or will not result in an "injustice". Quite the opposite. The failure to provide them will unfairly prejudice me, as member of the public, and will result in an injustice. The right of the public to know on what basis and by what rigorous process formal published opinions are issued by public officials charged with that responsibility could not be more obvious."

There appears to be no reported case outside the litigation context in which the work product rule was cited as a basis for denying disclosure of a public record under Section 6254(k) of the CPRA. That subsection was added to the CPRA in 1981.

Further to the point, when discussing the work product rule as an exemption, the California Attorney General in the Summary of the California Records Act (2004), on page 9, only describes the "absolute" rule, ignoring any reference to the qualified rule in §2018.030(b), stating:

"Attorney Work Product

"The attorney work product rule covers research, analysis, impressions and conclusions of an attorney. This confidentiality rule appears in section 2018 of the Code of Civil Procedure and is incorporated into the CPRA through section 6254(k). Records subject to the rule are confidential forever. The rule applies in litigation and nonlitigation circumstances alike. (Footnote reference omitted)"

The implication is obvious. The conditional or qualified work product rule is not a true exemption under the CPRA and is not available as a basis for denying disclosure of public records.

One final comment. In my November 3, 2006 I requested:

"Any and all versions of documents and records, **in what ever form or media, in their original format, whether in printed or electronic form or in computer data bases,** relating or pertaining to, in connection with, concerning or with reference to the processes, procedures, policies, practices, standards or methods adopted, established or followed by the Office of the City Attorney ..." (Emphasis mine.)

The footer at the bottom of each page of the memorandum shows that it is a Word document in an electronic format. The version sent me by email (which I did not receive) was a PDF copy of the original electronic formatted Word public record.

I look forward to promptly receiving an email transmitting an unredacted clean copy of the document in its original electronic formatted Word version. Because of the prior problem in my receiving emails from your office, please advise me by facsimile when it is sent so I can check whether it has been received.

Very Truly Yours

Allen Grossman

Cc: Mr. Matt Dorsey

CITY AND COUNTY OF SAN FRANCISCO

DENNIS J. HERRERA
City Attorney

OFFICE OF THE CITY ATTORNEY

VIRGINIA DARIO ELIZONDO
Deputy City Attorney

DIRECT DIAL: (415) 554-4654
E-MAIL: virginia.dario.elizondo@sfgov.org

September 16, 2008

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

Re: Complaint #08039 – Alan Grossman vs. City Attorney's Office

Dear Task Force Members:

The request for records at issue in this matter involves a February 26, 2007, letter that Deputy City Attorney Paul Zarefsky sent to the Sunshine Ordinance Task Force regarding Section 67.21(i) and the role of the City Attorney in giving advice to City departments. Complainant Allen Grossman requested various records from this office, including drafts of the letter and "[m]emoranda, emails or other communications to, from or among [Deputy City Attorney Rosa Sanchez] and/or any one or more Deputy City Attorneys or any other persons in the City Attorney's Office or the SOTF Administrator or any other person . . . ." regarding the letter.

This office declined to produce these records based on the attorney work product doctrine. The complainant then requested that this office identify the specific communications being withheld, citing Section 67.21(c) of the Sunshine Ordinance (hereafter, "Section 67.21(c)").

The complainant contends that the records at issue in this matter were not properly withheld under the work product doctrine. The complainant further contends that in any event this office violated Section 67.21(c) by not identifying the withheld records.

We address these issues below.

No Duty to Produce Attorney Work Product

This office has made clear its view that City departments may decline to produce records that are protected by the work product doctrine. *The Good Government Guide*, 2007-08 Edition, at pp. 76-77, states as follows:

5. ATTORNEY WORK PRODUCT

A department is not required to disclose records that contain the legal work of an attorney representing the City if the work is protected under the attorney work product doctrine. Govt. Code §6254(k); Code Civ. Proc. §2018.030. The attorney work product doctrine protects "[a] writing that reflects an attorney's impressions, conclusions, opinions, or legal re-search or theories." Code Civ. Proc.§ 2018.030(a). The work product doctrine may also extend to other records relating to the legal work of attorneys representing the City, including documents prepared at the request of attorneys, such as reports by investigators, consultants and other experts. The work product privilege is separate from, and can cover records not protected by, the

attorney-client privilege. If your department receives a public records request for such a record, please contact the Office of the City Attorney for further assistance.

The complainant argues that Subsections (ii) and (iii) of Section 67.24(b) require that this office disclose the records in issue. These Sections provide as follows:

b) Litigation Material.

(1) Notwithstanding any exemptions otherwise provided by law, the following are public records subject to disclosure under this Ordinance:

* * *

(ii) A record previously received or created by a department in the ordinary course of business that was not attorney/client privileged when it was previously received or created;

(iii) Advice on compliance with, analysis of, an opinion concerning liability under, or any communication otherwise concerning the California Public Records Act, the Ralph M. Brown Act, the Political Reform Act, any San Francisco Governmental Ethics Code, or this Ordinance.

Section 67.24(b)(1)(ii)

The complainant contends that the records in issue were, in the language of Subsection (ii) of Section 67.24(b), "previously received or created by a department in the ordinary course of business that was not attorney/client privileged when it was previously received or created." This provision addresses the concern that a City department may improperly attempt to treat a record that is public as if it were exempt from disclosure merely because the record may be relevant in litigation or has been transmitted to the department's attorney.

But this provision does not apply to the records in issue. As attorneys for the City, the members of this office create and obtain records in the performance of our duties that are typically covered by the attorney-client privilege and/or the attorney work product doctrine at the time those records are obtained or created. For example, if an attorney in this office prepares a legal memorandum, it constitutes work product at the time it is created. Because the records withheld by this office in response to the complainant's request are protected – and have always been protected – by the work product doctrine, the provisions of Section 67.24(b)(1)(ii) do not apply.

Section 67.24(b)(1)(iii)

The complainant also rests his argument on Subsection (iii) of Section 67.24(b), which covers "[a]dvice on compliance with [and] analysis of . . . the California Public Records Act [and the Sunshine Ordinance]." It is thus necessary to consider whether this provision of the Sunshine Ordinance applies to an attorney's work product.

Section 67.24(b)(iii) makes no reference to an attorney's work product. The protections afforded the attorney work product arise under State law and are expressly incorporated in the Public Records Act (Cal. Gov. Code §6276.01). The absence of any reference to work product compels the conclusion that the Sunshine Ordinance did not intend to require the disclosure of records that constitute work product.

But, the complainant argues, this office may not rely on the work product privilege because that exception is limited to records prepared in anticipation of litigation and at the direction of counsel. There is no such limitation. "The protection afforded by the privilege is not limited to writings created by a lawyer in anticipation of a lawsuit. It applies as well to writings prepared by an attorney while acting in a nonlitigation capacity." *County of Los*

Angeles County of Los Angeles v. Superior Court (2000) 82 Cal.App.4th 819, 833. S*ee also, Rumac, Inc. v. Bottomly, et al*, (1983) 143 Cal.App.3d 810, and the cases and authorities cited therein.

California Code of Civil Procedure Section 2018.030(a) provides that "[a] writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories shall not be discoverable under any circumstances." Section 2018.030(b) provides that "[t]he work product of an attorney, other than a writing described in subdivision (a), is not discoverable unless the court determines that denial of discovery will unfairly prejudice the party seeking discovery in preparing that party's claim or defense or will result in an injustice." The attorney work product doctrine thus provides (1) an absolute protection for an attorney's impressions, conclusions, opinions, or legal research or theories and (2) a qualified privilege for other work product of an attorney.

Insofar as the records in issue in this matter reflect the impressions, conclusions, opinions, or legal research or theories of the attorneys in this office, such documents are absolutely protected under Code of Civil Procedure Section 2018.030(a). *American Mut. Liab. Ins. Co. v. Superior Court,* 38 C.A.3d 579, 594 (1974). Any draft of the letter in issue in this matter is clearly absolutely protected. Insofar as any of the communications in issue reflect the impressions, conclusions, opinions or legal research or theories of the attorneys involved, they are also absolutely protected.

Insofar as any of the communications in issue do not reflect the impressions, conclusions, opinions or legal research or theories of the attorneys involved in the communications, they are entitled to qualified protection under work product doctrine. Code of Civil Procedure Section 2018.030(b) *American Mut. Liab., supra.* The Code of Civil Procedure allows a court to determine that the withholding of records that are entitled to qualified protection would unfairly prejudice a party in preparing a claim or defense or result in an injustice.

In deciding whether to disclose communication at issue in this matter that are entitled to the qualified protection under the work product doctrine, this office was required to consider whether the withholding of the records would unfairly prejudice any person or result in an injustice. This office concluded that no such prejudice or injustice would occur.

No Duty to Identify Records Withheld

When this office informed the complainant that it had records responsive to his request but declined to produce them based on the attorney work product doctrine, the complainant then asked that we identify the records being withheld. The complainant made his request under Section 67.21(c).

(c) A custodian of a public record shall assist a requester in identifying the existence, form, and nature of any records or information maintained by, available to, or in the custody of the custodian, whether or not the contents of those records are exempt from disclosure and shall, when requested to do so, provide in writing within seven days following receipt of a request, a statement as to the existence, quantity, form and nature of records relating to a particular subject or questions with enough specificity to enable a requester to identify records in order to make a request under (b). A custodian of any public record, when not in possession of the record requested, shall assist a requester in directing a request to the proper office or staff person. [Emphasis added.]

The express purpose of Section 67.21(c) is to require City departments to describe their system of creating and maintaining records to members of the public who ask for that information so that they can make an effective public records request. The public often does not know enough about City departmental operations to make a reasonably specific request and to

make it to the correct department. Section 67.21(c) is irrelevant where, as in this case, the requester knows the records that he wants and has made a clear request for them. The dispute is not over the requester's broad or unclear description of the records, but over whether records that have been clearly identified are required to be disclosed. Further identification does not serve the purpose of Section 67.21(c).

This issue of the duty under the California Public Records Act to identify withheld records was addressed in *Haynie v. Superior Court* (2001) 26 Cal.4th 1061. In that case, the court considered the holding of a trial court that ruled on the actions taken by the Los Angeles Sheriff's Department in response to a public records request. The Sheriff withheld certain records, citing various permitted exceptions. The trial court held that the Sheriff was required by the Public Records Act to provide the requester with "an enumeration or description of all responsive records, regardless of whether those records were exempt from disclosure." The California Supreme Court overruled the trial court on this issue, holding that a public agency is required to provide the basis for withholding records but is not required "to go further and *describe* each of the documents falling within the statutory exemption." *Haynie*, *supra*, at 1074.

Under *Haynie*, this office has no duty under the California Public Records Act to provide the identification of records that the complainant requested. Nor does the Sunshine Ordinance suggest an intent to depart from the policy set by the Legislature in the Public Records Act. The complainant attempts to distinguish the California Supreme Court's decision in *Haynie*. He argues that *Haynie* was construing Section 6254(f), governing the records of a law enforcement agency, and that the holding of the decision should therefore be narrowly construed. But as the following discussion from *Haynie* makes clear, the holding is much broader than the complainant contends:

> The Court of Appeal also ruled that, upon receiving Haynie's Demand for Public Records, the County was obligated to determine whether the records exist, "enumerate or describe the records so discovered, identify exemptions applying to any enumerated or described records, and disclose the remaining records." In this court, the County does not dispute its obligation to determine whether requested records exist and whether exemptions apply to those records nor does it deny its duty to disclose nonexempt records that it has found. The County objects only to the ruling of the Court of Appeal that it should have provided Haynie with an enumeration or description of all responsive records, regardless of whether those records were exempt from disclosure.
>
> Section 6255 states that if records within the ambit of the request are withheld based on a statutory exemption, the agency must disclose that fact. Heretofore, however, the agency, in its initial response to a request for inspection of records, has not been required to create an inventory of the records responsive to the request or those for which it claims an exemption. Such a list has been ordered only when a petition to compel disclosure has been filed, the agency claims the records are protected by an exemption, and the records are being transmitted to the court for in camera review to evaluate the claim. After the petition had been filed in Williams, for example, the superior court ordered the Sheriff of San Bernardino County to lodge under seal the records for which an exemption was claimed and provide the petitioner with an index of the records being lodged. (Williams, supra, 5 Cal.4th at p. 344.) In State Bd. of Equalization v. Superior Court (1992) 10 Cal.App.4th 1177 [13 Cal.Rptr.2d 342], the board complained that the burden of complying with the petitioner's

CPRA request far exceeded the benefits. The Court of Appeal approved the solution of the superior court, which was to direct the board to prepare a list of responsive documents to permit the petitioner to refine its request to exclude unwanted documents. (Id. at pp. 1183-1184, 1191-1192.)

The County does not challenge here the ability of a court to direct an agency, once the petition has been filed, to prepare a list of responsive records and provide it to the requesting party. Rather, it contends that requiring the preparation of a list of all potentially responsive records as part of the agency's initial response to a request for inspection goes beyond any responsibility imposed on public agencies by the CPRA, the case law construing and applying the act, or sound public policy.

This requirement, the County argues, expands the scope of the CPRA far beyond its original purpose of simply making records available for inspection. The law mandates that public records be "open to inspection at all times during the office hours of the state or local agency" (§ 6253, subd. (a)), recognizes that "every person has a right to inspect any public record" not exempted by the act (ibid.), and obliges the public agency to provide copies of its nonexempt records at the expense of the person requesting copies. (§ 6253, subd. (b).) In so doing, the Legislature has endeavored both to maximize public access to agency records and minimize the burden and expense that opening the records to inspection and copying imposes on public agencies. In other circumstances, where the Legislature has intended for a responding party to enumerate and describe each document being withheld, it has done so with great specificity. (E.g., Code Civ. Proc., § 2031, subd. (g)(3).) Although the CPRA describes its procedures and exceptions "in exceptionally careful detail" (Williams, supra, 5 Cal.4th at p. 361), it contains no equivalent provision describing an agency's duty to create a log of documents exempt from disclosure.

Haynie suggests that such a requirement may be inferred from section 6255, subdivision (a), which provides: "The agency shall justify withholding any record by demonstrating that the record in question is exempt under express provisions of this chapter or that on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record." We have previously referred to this provision as "a catch-all exemption." (Williams, supra, 5 Cal.4th at p. 347, fn. 9.) It outlines the circumstances under which an agency may withhold a record: by demonstrating that the record falls within a statutory exemption or that the public interest in nondisclosure clearly outweighs the public interest in disclosure. When an agency, in compliance with section 6255, articulates one or more of these exemptions, it will necessarily reveal the general nature of the documents withheld. For example, an agency that invokes subdivision (j) of section 6254 has revealed that the withheld documents are library circulation records. Here, the County's invocation of section 6254(f) revealed that the withheld documents were records of an investigation. What section 6255 does not require, however, is for the agency to go further and describe each of the documents falling within the statutory exemption. The Legislature, which has carefully detailed the components of the agency's denial of a CPRA request, even to the point of requiring the agency to "set

> forth the names and titles or positions of each person responsible for the denial" (§ 6253, subd. (d)), is fully capable of requiring agencies to include a log of withheld documents. Given this detailed scheme, it would be inappropriate for us to enlarge the agency's burden under the guise of interpreting the statute.
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> The case law, as stated, has never approved or even mentioned a public agency's obligation to create a list and description of documents withheld at the prepetition stage. Indeed, the Court of Appeal in State Bd. of Equalization v. Superior Court, while affirming the superior court's order directing the preparation of a list after a petition had been filed, noted that "the Public Records Act does not, like the FOIA, require the maintenance of an index of records available for public inspection ...." (State Bd. of Equalization v. Superior Court, supra, 10 Cal.App.4th at p. 1193.)
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> The burdens and risks of such a requirement appear substantial. Requiring a public agency to provide a list of all records in its possession that may be responsive to a CPRA request has the potential for imposing significant costs on the agency. A single request may involve thousands of pages of materials. (E.g., State Bd. of Equalization v. Superior Court, supra, 10 Cal.App.4th at p. 1183, fn. 6.) To require each public agency to catalog the responsive documents for each of the requests it receives-even when the agency could legitimately claim that all responsive documents are exempt from disclosure-would be burdensome and of scant public benefit. (Cf. Times Mirror Co. v. Superior Court (1991) 53 Cal.3d 1325, 1345 [283 Cal.Rptr. 893, 813 P.2d 240] [request for copies of the Governor's appointment schedules, calendars, notebooks, and any other documents listing the Governor's daily activities over a five-year period].) In addition, where (as here) the documents are generated as part of a criminal investigation, a list of documents withheld may also reveal information ordinarily deemed exempt from disclosure, such as how far the investigation had progressed, whether witnesses had been contacted, and whether forensic tests had been conducted. Moreover, the log itself may launch satellite litigation over the adequacy of its descriptions of the documents exempt from disclosure.
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> We have no doubt that an agency may elect to create such a list, with or without requiring reimbursement for its costs, but we find nothing in the act itself that mandates any action other than opening for inspection the records identified as coming within the scope of the request or providing copies thereof at the expense of the person requesting copies. Preparing an inventory of potentially responsive records is not mandated by the CPRA. We therefore conclude that the Court of Appeal erred in holding that such inventories or lists must be created as a matter of course as part of the agency's initial response to CPRA requests.

Haynie, supra, 1072-1075.

The complainant also contends that *Haynie* is not controlling because it was decided before the enactment of Government Code Section 6253.1, which provides as follows.

(a) When a member of the public requests to inspect a public record or obtain a copy of a public record, the public agency, in order to assist the member of the public make a focused and

effective request that reasonably describes an identifiable record or records, shall do all of the following, to the extent reasonable under the circumstances:

(1) Assist the member of the public to identify records and information that are responsive to the request or to the purpose of the request, if stated.

(2) Describe the information technology and physical location in

which the records exist.

(3) Provide suggestions for overcoming any practical basis for denying access to the records or information sought.

(b) The requirements of paragraph (1) of subdivision (a) shall be deemed to have been satisfied if the public agency is unable to identify the requested information after making a reasonable effort to elicit additional clarifying information from the requester that will help identify the record or records.

(c) The requirements of subdivision (a) are in addition to any action required of a public agency by Section 6253.

(d) This section shall not apply to a request for public records if any of the following applies:

(1) The public agency makes available the requested records pursuant to Section 6253.

(2) The public agency determines that the request should be denied and bases that determination solely on an exemption listed in Section 6254.

(3) The public agency makes available an index of its records.

[Emphasis added.]

The purpose of Section 6253.1, like that of Section 67.21(c), is to assist the requester to make a focused and effective public records request, as is clear from the highlighted language above. For the same reason that Section 67.21(c) does not mandate identification of specific communications withheld, Section 6253.1 has no such mandate.

Further, Section 6253.1(d)(2) does not even apply where the public agency withholds records based on an exemption listed in Government Code Section 6254. This office withheld the records in issue based on an exemption listed in Section 6254, Subsection (k). As the complainant notes, Section 6254(k) has been construed to include the work product doctrine.

Therefore, we decline to produce documents protected by the attorney work product doctrine and neither the California Public Records Act nor the Sunshine Ordinance compel us to identify the specific documents withheld.

Very truly yours,

DENNIS J. HERRERA
City Attorney

VIRGINIA DARIO ELIZONDO
Deputy City Attorney