

Date: November 30, 2010

Item No. 12 & 13
File No. 10049

SUNSHINE ORDINANCE TASK FORCE

AGENDA PACKET CONTENTS LIST*

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Completed by: Chris Rustom

Date: Nov. 23, 2010

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

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

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



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MEMORANDUM

November 22, 2010

STEPHEN WILLIAMS v. PPLANNING DEPARTMENT & COMMISSION (10049)

COMPLAINT

THE COMPLAINANT ALLEGES THE FOLLOWING:

Complainant Stephen Williams alleges that the San Francisco Department of City Planning and Planning Commission ("Planning") failed to include in the public review file a copy of the Draft Environmental Impact Review ("DEIR") which was mailed to commission members in their agenda packets for consideration prior to their August 4, 2010 meeting of unspecified date.

COMPLAINANT FILES COMPLAINT:

On September 23, 2010, Mr. Williams filed a complaint against the Commission.

JURISDICTION

The Planning Commission is a policy body of the City; therefore this committee generally has jurisdiction to determine whether there was a violation, as alleged. Jurisdiction has not been contested by the Planning.

APPLICABLE STATUTORY SECTION(S):

Section 67 of the San Francisco Administrative Code:

Section 67.9 deals with documents that must be provided to the public for their review in connection with meetings of a policy body.

Section 54950 et seq. of the Cal. Gov't Code

Section 54957.5 deals with documents that must be provided to the public for their review in connection with meetings of a legislative body or local agency.

APPLICABLE CASE LAW:

- none

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RE: *Complaint 10049: Williams v. Planning*

ISSUES TO BE DETERMINED

Uncontested Facts: Complainant alleges that the public review of and comment on the Draft EIR for the project at 800 Presidio came before the Commission on a date unspecified and that the DEIR was mailed to the Commissioners in their agenda packets. He further alleges that the DEIR was not provided for review by the public in the public file left for review at 1650 Mission Street.

The Commission does not directly dispute these allegations in regard to the absence of the DEIR from the public review file at the time Complainant reviewed the file. Instead, on behalf of the Commission, Environmental Planner Michael Jacinto alleges other facts regarding the availability of the DEIR to Complainant and other members of the public. Respondent alleges that notices of availability of the DEIR were sent to members of the public including Complainant. It alleges that the DEIR was published on the Planning Department's website on June 23, 2010 and remained posted there until present. Respondent further alleges that on July 2, 2010, Complainant physically reviewed the administrative record for the project, which includes a copy of the DEIR. Respondent alleges that as a matter of routine procedure, it includes hard copies of all documents in a file for public review the week before a public hearing on the matter, but does not dispute Complainant's allegation that the DEIR was not in the file for public review. Instead, respondent suggests that a member of the public may have removed the DEIR from the file, as the Department does not provide monitoring of the file while it is reviewed by the public. Respondent further suggest that if the DEIR were missing from the public file, as alleged, then a member of the public would have called this fact to the attention of the Department staff so that it could be replaced.

QUESTIONS THAT MIGHT ASSIST IN DETERMINING FACTS:

- Did the Commission place the DEIR in the public review file?
- If so, does the Commission regularly review the public review file to ensure that it remains complete? How often?
- If so, was the file complete upon each review?

LEGAL ISSUES/LEGAL DETERMINATIONS:

- Assuming the DEIR was not part of the public review file for some period, as alleged, does this constitute a violation of the Sunshine Ordinance or the Brown Act?

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CONCLUSION

THE TASK FORCE FINDS THE FOLLOWING FACTS TO BE TRUE:

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

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

Article I Section 3 provides:

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

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

SECTION 67.1 FINDINGS AND PURPOSE

The Board of Supervisors and the People of the City and County of San Francisco find and declare:

- (a) Government's duty is to serve the public, reaching its decisions in full view of the public.
- (b) Elected officials, commissions, boards, councils and other agencies of the City and County exist to conduct the people's business. The people do not cede to these entities the right to decide what the people should know about the operations of local government.
- (c) Although California has a long tradition of laws designed to protect the public's access to the workings of government, every generation of governmental leaders includes officials who feel more comfortable conducting public business away from the scrutiny of those who elect and employ them. New approaches to government constantly offer public officials additional ways to hide the making of public policy from the public. As government evolves, so must the laws designed to ensure that the process remains visible.
- (f) The people of San Francisco enact these amendments to assure that the people of the City remain in control of the government they have created.
- (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.

SEC. 67.9. AGENDAS AND RELATED MATERIALS: PUBLIC RECORDS.

- (a) Agendas of meetings and any other documents on file with the clerk of the policy body, when intended for distribution to all, or a majority of all, of the members of a policy body in connection with a matter anticipated for discussion or consideration at a public meeting shall be made available to the public. To the extent possible, such documents shall also be made available through the policy body's Internet site. However, this disclosure need not include any material exempt from public disclosure under this ordinance.
- (b) Records which are subject to disclosure under subdivision (a) and which are intended for distribution to a policy body prior to commencement of a public meeting shall be made available for public inspection and copying upon request prior to commencement of such meeting, whether or not actually distributed to or received by the body at the time of the request.
- (c) Records which are subject to disclosure under subdivision (a) and which are distributed during a public meeting but prior to commencement of their discussion shall be made available for public inspection prior to commencement of, and during, their discussion.

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(d) Records which are subject to disclosure under subdivision (a) and which are distributed during their discussion at a public meeting shall be made available for public inspection immediately or as soon thereafter as is practicable.

(e) A policy body may charge a duplication fee of one cent per page for a copy of a public record prepared for consideration at a public meeting, unless a special fee has been established pursuant to the procedure set forth in Section 67.28(d). Neither this section nor the California Public Records Act (Government Code sections 6250 et seq.) shall be construed to limit or delay the public's right to inspect any record required to be disclosed by that act, whether or not distributed to a policy body.

RALPH M. BROWN ACT (GOVT. CODE §§ 54950, ET SEQ.)**§ 54957.5. AGENDAS AND OTHER WRITINGS DISTRIBUTED FOR DISCUSSION OR CONSIDERATION AT PUBLIC MEETINGS; PUBLIC RECORDS; INSPECTION; CLOSED SESSIONS**

(a) Notwithstanding Section 6255 or any other provisions of law, agendas of public meetings and any other writings, when distributed to all, or a majority of all, of the members of a legislative body of a local agency by any person in connection with a matter subject to discussion or consideration at a public meeting of the body, are disclosable public records under the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1), and shall be made available upon request without delay. However, this section shall not include any writing exempt from public disclosure under Section 6253.5, 6254, 6254.7, or 6254.22.

(b) Writings that are public records under subdivision (a) and that are distributed during a public meeting shall be made available for public inspection at the meeting if prepared by the local agency or a member of its legislative body, or after the meeting if prepared by some other person. These writings shall be made available in appropriate alternative formats upon request by a person with a disability, as required by Section 202 of the Americans with Disabilities Act of 1990 (42 U.S.C. Sec. 12132), and the federal rules and regulations adopted in implementation thereof.

(c) Nothing in this chapter shall be construed to prevent the legislative body of a local agency from charging a fee or deposit for a copy of a public record pursuant to Section 6253, except that no surcharge shall be imposed on persons with disabilities in violation of Section 202 of the Americans with Disabilities Act of 1990 (42 U.S.C. Sec. 12132), and the federal rules and regulations adopted in implementation thereof.

(d) This section shall not be construed to limit or delay the public's right to inspect or obtain a copy of any record required to be disclosed under the requirements of the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1). Nothing in this chapter shall be construed to require a legislative body of a local agency to place any paid advertisement or any other paid notice in any publication.



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 Planning Dept & Commission

Name of individual contacted at Department or Commission Michael Jacinto and to entire Commission

[X] Alleged violation public records access
[X] Alleged violation of public meeting. Date of meeting August 5, 2010

Sunshine Ordinance Section 67.9 et al
(If known, please cite specific provision(s) being violated)

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

A draft EIR was set for public comment and the DEIR was distributed to each Commissioner in the mailed "packet." However, the DEIR was not included in the public review file at 1650 Mission Street along with all the other documents which were distributed to the Commission before the meeting in the packet. The public review room at planning has the DEIR for all other project but, the project at 800 Presidio Ave, was excluded.

Do you want a public hearing before the Sunshine Ordinance Task Force? [X] yes [] no
Do you also want a pre-hearing conference before the Complaint Committee? [X] yes [] no

(Optional)¹

Name Stephen Williams Address Divisadero SF 94115

Telephone No. 415-██████████ E-Mail Address ██████████@stevewilliamslaw.com

Date Sept. 21, 2010

Handwritten signature and the word "Signature" printed below it.

I request confidentiality of my personal information. [X] yes [] no

¹ NOTICE: PERSONAL INFORMATION THAT YOU PROVIDE MAY BE SUBJECT TO DISCLOSURE UNDER THE CALIFORNIA PUBLIC RECORDS ACT AND THE SUNSHINE ORDINANCE, EXCEPT WHEN CONFIDENTIALITY IS SPECIFICALLY REQUESTED. YOU MAY LIST YOUR BUSINESS/OFFICE ADDRESS, TELEPHONE NUMBER AND E-MAIL ADDRESS IN LIEU OF YOUR HOME ADDRESS OR OTHER PERSONAL CONTACT INFORMATION. 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).



SAN FRANCISCO PLANNING DEPARTMENT

October 14, 2010

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

Subject: Complaint from Stephen Williams to Planning Department regarding availability of Draft EIR and other materials for 800 Presidio Avenue (Planning Dept. Case No. 2006.0868E)

Task Force Members:

On September 23, 2010, the Planning Department ("Department") received a complaint from Mr. Stephen Williams ("Complainant") through the Sunshine Ordinance Task Force via electronic mail that states:

"A draft EIR was sent for public comment and the DEIR was distributed to each Commissioner in the mailed 'packet.' However, the DEIR was not included in the public review file at 1650 Mission Street along with other documents which were distributed to the Commission before the meeting in the packet. The public review room at planning has the DEIR for all other project, but the project at 800 Presidio Ave. was excluded."

The Department would like to state the following facts in response to the above complaint.

1. The Draft EIR (or "DEIR") for the proposed 800 Presidio Avenue was published on June 23, 2010 and had associated with it a 48-day public review period.
2. Notices of Availability of the Draft EIR were sent by mail (including to the party above) and indicated how one may request a hard copy and where the DEIR was available for review, including online on the Department's website, and at the Public Information Counter at 1660 Mission Street, 1st Floor.
3. The Draft EIR was published on the Department's website June 23, 2010 and is still posted on the site for interested parties to review, free of cost.
4. The Department transmitted the Draft EIR and pertinent documents electronically to the Historic Preservation Commission on June 23, 2010 nearly a month in advance of a hearing scheduled at that commission.
5. The Department points out that on July 2, 2010, Complainant physically reviewed the administrative record at the Department's office for the proposed project, which includes the DEIR in question and the background documents allegedly not made available to him, as stated above.
6. The Department includes hard copies of all documents in a file for public review the upcoming week's hearings. Complaint indicates that the document was not available in the public review file at the Department's offices prior to the hearing. The Department

1650 Mission St.
Suite 400
San Francisco,
CA 94103-2479

Reception:
415.558.6378

Fax:
415.558.6409

Planning
Information:
415.558.6377

does not provide constant observation of the file folder and acknowledges that a member of the public or other party may have removed the document.

7. In such an instance, it would follow that a member of the public would inquire with the receptionist or planner listed on the Commission's calendar as to the whereabouts of the document in question or how to acquire a copy. Staff received no call from the receptionist or Complainant indicating a request for the documentation.

Based on a review of Planning Department records, given that the Complainant had received a Notice of Availability of the Draft EIR indicating how to request a hard copy or where to view an electronic version online; that the Complainant had reviewed the project's administrative record (which includes a copy of the document in question and all pertinent background studies) at the Department offices on July 2, 2010 after publication of the DEIR; and that staff has no record of a specific request nor any indication from the Complainant for the document, or that the document was missing (and thus had no opportunity to provide remedy or fulfill any request for said document or any other project-related materials), the Department's position is that it complied with Chapter 31 of the Administrative Code implementing the California Environmental Quality Act and the following complaint is unwarranted.

Sincerely,

A handwritten signature in black ink, appearing to read 'Michael Jacinto', with a long horizontal line extending to the right.

Michael Jacinto
Environmental Planner



November 23, 2010

Richard Knee, Chair
Sunshine Ordinance Task Force
1 Dr. Carlton B. Goodlett Place, City Hall
San Francisco, CA 94102

RE: Complaints 10048 & 10049
Complaints against Historic Preservation Commission and Planning Commission
Hearing Date: November 30, 2010—4:00pm

Chairman Knee and Members of the Task Force:

My complaint against the Historic Preservation Commission and Planning Commission is identical and is really very simple. The materials sent to the Commission members in both instances were different from the information supplied in the "public review file." The case involving the proposed project at 800 Presidio was treated differently from other development proposals in this regard.

I twice visited the public information room at the Planning Department to review the Draft EIR and it was never placed in the public review file for either commission. On August 4, 2010, I appeared at the Historic Preservation Commission and specifically pointed that fact out to the Commission. At the hearing room the public file is placed on a table to the side of the Commission for review by the public. Again at the hearing I confirmed that the DEIR was never placed in that file.

In response to my comments, Planner Michael Jacinto acknowledged to the Commission that the DEIR was not in the file in the hearing room and acknowledged that it had never been placed in the public file, but, he insisted it was available elsewhere in the Department. The statement he has submitted to the Task Force is false and is in direct contrast to the testimony he gave to the Historic Preservation Commission.

At that time he acknowledged that the DEIR has never been put in the public file or in the public information room, but told me and the Commission that it could have been obtained at the Planning Counter or on a "link" at the Department's website. I asked him why that different procedure had been used and he told me that it was a new procedure. He told the Commission the information was available on a "link" on the Department's website. I testified and commented on Mr. Jacinto's testimony to the Historic Preservation Commission the following day at the Planning Commission.

On August 5, 2010, I appeared at the Planning Commission and made the same complaint and specifically commented on the excuse given the previous day. I stated as follows:

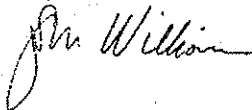
“Good afternoon, commissioners—Steve Williams. I live nearby. I don't represent anyone in this particular case.

Let me start with an objection on procedural grounds. The draft E.I.R. Is not in the packet or the public reading room and in fact the most recent HRER is not even linked up. So, what we were told yesterday at the Historic Preservation Commission is-- “Well, (the DEIR is not in the packet but) the links are all provided.” But the most recent HRER is not even on the link, so they have not complied with the laws governing open meetings and public notification.”

I then went on to make comments on the merits of the Draft EIR.

The testimony above clearly demonstrates that Mr. Jacinto acknowledged that the DEIR was not available in the public files and was not even included in the file at the hearing itself and is now misrepresenting those facts to the Task Force.

Very Truly Yours,



Stephen M. Williams

