

Date: November 30, 2010

Item No. 8  
File No. 10047

## SUNSHINE ORDINANCE TASK FORCE

### AGENDA PACKET CONTENTS LIST\*

- Kellee Lanza v District Attorney's Office**
- 
- 
- 
- 
- 
- 
- 
- 
- 
- 

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.



**SUNSHINE ORDINANCE  
TASK FORCE**



City Hall  
1 Dr. Carlton B. Goodlett Place, Room 244  
San Francisco 94102-4689  
Tel. No. (415) 554-7724  
Fax No. (415) 554-7854  
TDD/TTY No. (415) 554-5227

**ORDER OF DETERMINATION**  
November 1, 2010

**DATE THE DECISION ISSUED**  
October 26, 2010

*KELEE LANZA v DISTRICT ATTORNEY'S OFFICE (CASE NO. 10047)*

**FACTS OF THE CASE**

Kellee Lanza ("Complainant") alleges that the San Francisco District Attorney's Office ("DA") and Chief of Administration Paul Henderson, have failed to comply with the requirements of the California Public Records Act by failing to produce several categories of documents which the Complainant first requested on June 29, 2010.

**COMPLAINT FILED**

On September 3, 2010, Ms. Lanza filed a complaint against the DA.

**HEARING ON THE COMPLAINT**

On October 26, 2010, Ms. Lanza presented her case before the Sunshine Ordinance Task Force ("Task Force"). Respondent was represented by Mr. Henderson and Assistant District Attorney Seth Steward.

Ms. Lanza said she made a public records request regarding DA Kamala Harris to the DA's office on June 29, 2010. She said the office responded on July 12 saying it needed an extra two weeks. She said starting mid August she started calling the office once a week and sent a reminder email during the last week of August. She said no response was provided. She said she additionally sent a demand letter on September 2, the day before she filed a complaint with the Task Force.

On Sept. 7, she said, she received 69 pages of documents, which met two of her 11 requests. She said last week she received more documents, but very little has been produced during the four-month period. Ms. Lanza had earlier said she worked for a public affairs company and that her request was related to the upcoming November 2 elections in which Ms. Harris was a candidate. In closing, Ms. Lanza said she also requested

**ORDER OF DETERMINATION**

information from two other city departments within the same time frame and was provided with the information within a few weeks.

Mr. Steward said he was not knowledgeable on the matter but was in attendance to request a continuance on behalf of his office. As he addressed the Task Force, Mr. Henderson entered the room and told the Task Force that his office has been responding to the request on a rolling basis. He said he could not provide the Task Force with specific answers to all questions because staff members working on the Complainant's request were not available, hence the request for a continuance.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Based on the testimony and evidence presented, the Task Force finds that the agency violated the Ordinance. Although Mr. Henderson asserted that the DA's office was making reasonable efforts to respond to Ms. Lanza's request, testimony elicited at the Task Force's October 26, 2010, hearing showed otherwise. For example, Mr. Henderson could provide no credible answer to the question of why the DA's office could not produce the job titles held by Ms. Harris for the past eight years - a mundane chore which undoubtedly involves a minimal exertion of effort. Similarly, Mr. Henderson could not explain why the DA's office failed for nearly four months to respond to a request for Ms. Harris's public calendar, when Section 67.29-5 requires the release of those documents within *three business days*.

Applying the implied rule of reason as established by *Rosenthal v. Hansen* (1973) 34 Cal.App.3d 754, 761 and other authorities, the Task Force concluded that, four months was an unreasonably long period of time to respond to at least the most basic requests, particularly given that the DA's office is accustomed to working within the confines of a very limited time frame when it comes to producing documents, e.g. for discovery purposes in litigation.

**DECISION AND ORDER OF DETERMINATION**

Applying the implied rule of reason from *Rosenthal, supra*, 34 Cal.App.3d at p. 761, and other authorities, the Task Force finds that the agency violated Sunshine Ordinance Section(s) 67.21(b) for failure to justify withholding of documents, 67.21 (e) for not sending a knowledgeable representative to the hearing, 67.25(d) for failing to provide documents within the statutorily mandated time period, 65.26 for not keeping withholding to a minimum, and 67.29-5 because calendars must be made available to any requester three business days subsequent to the calendar entry date.

The department shall release the records requested within 5 business days of the issuance of this Order and appear before the Compliance and Amendments Committee on November 9, 2010.

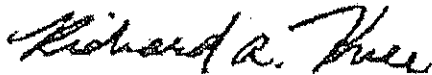
**ORDER OF DETERMINATION**

This Order of Determination was adopted by the Sunshine Ordinance Task Force on October 26, 2010, by the following vote: (Snyder / Wolfe )

Ayes: Snyder, Washburn, Knoebber, Wolfe, Johnson, Knee

Excused: Cauthen, Manneh, Williams

Recused: Chan



Richard A. Knee, Chair  
Sunshine Ordinance Task Force



David Snyder, Member, Seat #1\*  
Sunshine Ordinance Task Force

- c: Jerry Threet, Deputy City Attorney
- Kellee Lanza, Complainant
- Paul Henderson, Respondent
- Seth Steward, Respondent
- Sandip Patel, Respondent

\*Sunshine Ordinance Task Force Seat #1 is a voting seat held by an attorney specializing in sunshine law and nominated by the Society of Professional Journalists, Northern California.



KAMALA D. HARRIS  
District Attorney

Paul Henderson  
Chief of Administration

DIRECT DIAL: (415) 553-1845  
E-MAIL: Paul.Henderson@sfgov.org

SUBMITTED DURING 11/9/2010 CAC MEETING

November 9, 2010

Allyson Washburn, Chair  
Compliance and Amendments Committee  
Sunshine Ordinance Task Force  
1 Dr. Carlton B. Goodlett Place, Room 244  
San Francisco, CA 94102-4689

RE: *Kellee Lanza v. District Attorney's Office* (Case No. 10047)

Dear Chair Washburn and Committee Members:

By this letter, the District Attorney's Office wishes to provide the Compliance and Amendments Committee with an update regarding our response to the public records request at issue in *Kellee Lanza v. District Attorney's Office* (Case No. 10047). Since the Task Force first heard this matter on October 26, 2010, our office has reviewed and located additional responsive records which we are making available to the requester as of today. In addition, we are setting forth below a complete response and explanation regarding each of the eleven requested items.

On July 1, 2010, Kellee Lanza of MB Public Affairs Inc. submitted a public records request to the District Attorney's Office containing the following eleven requests:

1. *District Attorney Harris's titles held, units assigned and salary and per diem payments from 1998 to present.*
2. *District Attorney Harris's travel and reimbursement expenses from 1998 to present.*
3. *District Attorney Harris's official calendar from 2004 to present.*
4. *The names and titles of any public employees traveling with Harris on any out of state trips.*
5. *Vehicle allowance and any city or county owned vehicle assigned to Harris from 1998 to present.*
6. *The number of members of Harris's security detail, including their salaries.*
7. *All official email to and from Harris from 1998 to present (in electronic format, please).*
8. *Phone and cell phone records from 1998 to present.*
9. *District Attorney Office budgets from 2003 to present.*
10. *A list of all office employees and their titles in the last two years.*
11. *Any and all work-place related complaints filed against Harris or the office by employees from 2004 to present.*

The District Attorney's Office responded to this request on July 12, September 9 and October 18. In each of our responses, we explained that because of the voluminous nature of the records requested, our Office would be reviewing and disclosing responsive records on a rolling basis according to the doctrine of the "implied rule of reason." (See *Bruce v. Gregory* (1967) 65 Cal.2d 666, 673.) On September 9, we provided documents responsive to Items #9 and #10, and stated that we were continuing to locate and review other documents. On October 18, we

provided documents responsive to Item #2, and again explained that we were continuing to locate and review documents.

Since October 18, our Office has continued to work diligently to search for and locate records that are responsive to this request. As a result, we are pleased to report that we are now able to provide a response to all of the requests as set forth below:

1. *District Attorney Harris's titles held, units assigned and salary and per diem payments from 1998 to present.*

The District Attorney's Office has identified a total of 17 pages of records responsive to this request, copies of which are now available for pick up. We have redacted from these records certain personal information such as social security numbers, personal phone numbers and home addresses in order to protect the individual's right to privacy. (Cal. Govt. Code §§ 6250, 6254(c); Cal. Const. Art. I, § 1; S.F. Admin. Code § 67.1(g); S.F. Admin. Code Chapter 12M.)

Please note that we could not locate any records showing the units to which Ms. Harris was assigned prior to January, 2004, when she became the San Francisco District Attorney. Also, there are no records showing per diem payments, aside from the travel reimbursements we have already provided you in response to Request #2.

2. *District Attorney Harris's travel and reimbursement expenses from 1998 to present.*

On September 9, 2010, our office provided you with all records responsive to this request.

3. *District Attorney Harris's official calendar from 2004 to present.*

We have located the District Attorney's official calendars for the time period covering the last two years, copies of which are now available for pick up. These official calendars are required under Section 67.29.5 of the Sunshine Ordinance (also known as "Prop G"). Pursuant to the District Attorney's Records Retention Policy, these official calendars must be kept for two years. There are no other official calendars in our possession.

4. *The names and titles of any public employees traveling with Harris on any out of state trips.*

First, we note that this is not a request for documents, but rather a request for information. In any event, we have located five pages of records showing travel reimbursements for staff members who travelled with the District Attorney out of state. Those records are now available for pick up as of today. We are unable to locate any other records responsive to this request.

5. *Vehicle allowance and any city or county owned vehicle assigned to Harris from 1998 to present.*

We have performed a diligent search of our records and have located no documents responsive to your request. As a courtesy, we can inform you that the District Attorney is driven in a vehicle assigned to the District Attorney's Office, and she does not receive a vehicle allowance.

6. *The number of members of Harris's security detail, including their salaries.*

First, we note that this is not a request for documents, but rather a request for information. The District Attorney's Office does not keep data in the form you have requested, and the Public Records Act and City Sunshine Ordinance do not require the Office to create records.

Specifically, the Office does not keep an accounting of the personnel deployed to protect the District Attorney. Deployment of department personnel to provide security for the District Attorney varies day to day depending on the security needs of a particular situation. For these reasons, the Department does not have documents responsive to your requests.

Second, the California Public Records Act protects the information sought from public disclosure. Under the California Public Records Act, Government Code Section 6254(f), the City is entitled to withhold "records of security procedures of ... any local police agency" or any "security files compiled by any ... local police agency..." The information sought constitutes "security procedures" and "security files" of the San Francisco District Attorney's Office because it relates to the level and type of security provided to the District Attorney.

Public disclosure of the number of personnel assigned to protect the District Attorney could jeopardize the safety of the District Attorney and of her security personnel. Disclosing the number of personnel assigned would permit individuals to ascertain the general level of security protection. This information would make the District Attorney and assigned personnel vulnerable and compromise their safety. As stated above, in order to preserve the safety of public officials, public employees and others, the Public Records Act and Sunshine Ordinance recognize an exception for "security procedures" and "security files." (See also *Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325, 1346 [finding that Governor's safety would be threatened by disclosure of daily calendar because it would reveal "those persons who will be with him, and when he will be alone."])<sup>1</sup>

Although we cannot disclose the number of members of the District Attorney's security detail for the reasons set forth above, we can provide the following response to the request for their salaries: the peace officers who perform that function for the District Attorney – however many persons that may be at any given time – earn a salary that ranges from \$74,932 to \$135,200.

7. *All official email to and from Harris from 1998 to present (in electronic format, please).*

First, under the California Public Records Act, a public records request must "reasonably describe an identifiable record or records ...." (Govt. Code § 6253(b).) A records request "must ... be focused and specific" about what it seeks. (*Rogers v. Superior Court* (1993) 19 Cal.App.4th 469, 481 [city need not produce telephone numbers that called or were called by members of City Council during one-year period, in response to "nonspecific and unfocused" records request].)

MB Public Affairs' request for *all* official email sent to or received by the District Attorney over a twelve-year period does not specify "an identifiable record or category of records." As such, it lacks the particularity required under public record laws. If MB Public Affairs wishes to make a more narrowly focused request, such as by identifying the subject matter for which they seek

<sup>1</sup> In *Times Mirror*, the Supreme Court analyzed the threat to the governor's safety under the balancing test provided under Section 6255 of the Public Records Act and concluded that the public interest in nondisclosure outweighed any public interest in disclosure. Although the City's Sunshine Ordinance does not incorporate Section 6255's balancing test, the District Attorney is a state actor when she investigates, prosecutes, prepares to prosecute, trains staff and develops policy in the area of criminal investigation and prosecution. (*Venegas v. County of Los Angeles* (2004) 32 Cal.4th 820, 833.) Accordingly, the Sunshine Ordinance cannot compel the DA to disclose documents when doing so would obstruct her duties. (*Rivero v. Superior Court* (1997) 54 Cal.App.4th 1048, 1058; Govt. Code § 25303.) Therefore, the balancing test is properly applied to the DA when she is acting in her capacity as a state actor. And, as in *Times Mirror*, the public interest served in not disclosing the DA's security detail clearly outweighs any public interest in disclosure.



records, our office will evaluate and respond to that request as appropriate. (See *Rosenthal v. Hansen* (1973) 34 Cal.App.3d 754, 761 [public agencies "may impose reasonable restrictions on general requests for voluminous classes of documents restricting copies to specific requests for copies of specific documents"].)

Second, in some cases, citizens who send email communications to the District Attorney's Office may provide information about crimes that have occurred or pending criminal investigations. In some cases, they may wish to make an anonymous petition or complaint to the District Attorney as their chief local law enforcement officer. These types of communications are protected from public disclosure under California Constitution Article I, section 3 (right to petition elected representatives), Government Code § 6254(f) (investigative and security records), Evidence Code Sections 1040 (official information privilege) and 1041 (identity information privilege), and Campaign and Governmental Conduct Code §§ 43.120, 4.123 (protecting identity of whistleblowers). In addition, these emails may contain private information such as personal email addresses and home phone numbers that are protected by the right to privacy. (Cal. Govt. Code §§ 6250, 6254(c); Cal. Const. Art. I, § 1; S.F. Admin. Code § 67.1(g); S.F. Admin. Code Chapter 12M). Finally, some of these email communications may reveal the deliberative or policymaking processes of the Office and therefore be exempt from disclosure under the deliberative process privilege. (See *Rogers v. Superior Court* (1993) 19 Cal.App.4th 469, 479 [telephone records of calls made and received by City Council members exempt from disclosure under the deliberative process privilege].)

In order to determine whether the emails would improperly disclose such communications, it would be necessary for the office to review the messages. The District Attorney receives official email at the following address: "districtattorney@sfgov.org." We have reviewed our files and determined that, as of today's date, there are a total of approximately 28,300 incoming and outgoing emails for her official email account dating back to 2006.<sup>2</sup> Reviewing such a voluminous number of emails would impose an unreasonable burden on the Office. The request would require employees to stop working on City business, print out all emails and review and redact where necessary each email message for privacy or privilege. The City would lose hours and hours of work by District Attorney personnel. A public records request, like this one, "which compels the production of a huge volume of material may be objectionable as unduly burdensome." (*California First Amendment Coalition v. Superior Court* (1998) 67 Cal.App.4th 159, 166 ["CFAC"]; see also *Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325, 1345 [the "massive weight" of public records request seeking "wholesale production" of five years of governor's calendars weighs against disclosure].) The California courts have ruled that public records statutes do not impose absolute requirements upon governmental agencies, and are limited by the reasonableness of the efforts required to respond. (See *Bruce v. Gregory* (1967) 65 Cal.2d 666, 676 [public records statutes are "subject to an implied rule of reason" and "inherent reasonable limitations"]; *CFAC, supra*, at p. 166 [agencies must comply with public records requests "so long as the record can be located with reasonable effort"].)

For these reasons, we are not providing records in response to this request. As noted above, if MB Public Affairs wishes to narrow its request to seek records relating to a particular subject matter, our office will evaluate and respond to that request as appropriate.

#### 8. *Phone and cell phone records from 1998 to present.*

This request is identical to Request #7, except that it asks for phone records instead of emails. For the same reasons set forth above under Request #7, we decline to provide records in response

<sup>2</sup> Under our office's records retention policy, District Attorney "correspondence" must be retained for two years. We do not have any emails pre-dating 2006.

to this request. In addition, we note that in the particular context of phone records, it would be impossible for our staff to conduct the necessary redactions from these records because there is no way to identify the nature or substance of each call from such records.

*9. District Attorney Office budgets from 2003 to present.*

On October 18, 2010, our office provided you with all records responsive to this request.

*10. A list of all office employees and their titles in the last two years.*

On October 18, 2010, our office provided you with a list of employees in response to this request. In addition, we have located lists of employees containing their name, job code and titles for the years 2008, 2009 and 2010. Copies of these lists are now available for pick up.

*11. Any and all work-place related complaints filed against Harris or the office by employees from 2004 to present.*

We have interpreted this request to be for complaints filed either in court or with outside administrative agencies. We have identified a total of six complaints that employees have filed against the District Attorney's Office since 2004 with the State Department of Fair Employment and Housing ("DFEH") and/or the Equal Opportunity Employment Commission ("EEOC"). These complaints allege discrimination under Title VII of the Civil Rights Act and/or the Americans with Disabilities Act. None of these complaints names Ms. Harris individually as the source of harassment or discrimination.

Sections 706(b) and 709(e) of Title VII and Section 107 of the ADA prohibit disclosure of Title VII and ADA charge files to third parties. In addition, the Evidence Code recognizes the need to maintain the confidentiality of complainants or witnesses reporting allegedly unlawful behavior and likewise recognizes the need to maintain the confidentiality of certain information acquired in an investigative context. (Cal. Evid. Code §1041 [identity of informer privilege]; Cal. Evid. Code §1040 [official information privilege].) These authorities provide a basis for withholding the requested records. (Cal. Govt. Code § 6254(k) [protecting from disclosure records "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."]).

In addition, maintaining the confidentiality of a complainant's charges is essential to complying with our obligations under law. (See EEOC Compliance Manual §615:0107-0108 [employer's policy regarding discrimination complaints should include assurances that employees will be protected against retaliation, and include assurances of confidentiality to the extent possible].) If records relating to employment discrimination allegations are subject to public disclosure, the City's ability to thoroughly and effectively investigate discrimination claims, and ultimately to maintain a discrimination-free workplace, might be seriously compromised. It would become common knowledge that EEO charges are public. Potential claimants could fear that their statements would directly or indirectly be included among the information made public, and consequently could be reluctant to voice complaints. In addition, individuals who are witnesses could fear disclosure of their statements and may be reluctant to cooperate in the ensuing investigation, and less open and frank when questioned by investigators.

Finally, there is an important privacy dimension to these records that the City must honor, not only as to complainants and witnesses but as to employees who may be the subject of the charges. Disclosure of allegations of harassment or discrimination runs the risk of unfairly tarring people with false or half-true charges or even with charges lacking any substantial basis. The public records laws recognize the importance of protecting privacy in contexts such as this. (See Cal. Gov. Code §6254(c) [protecting from disclosure "personnel, medical, or similar files,

the disclosure of which would constitute an unwarranted invasion of privacy"); Cal. Const., Art. I, §1 [constitutional right of privacy]; see also S.F. Admin. Code §67.1(g) [acknowledging that City employees have rights of privacy that must be respected].)

We hope that the Compliance and Amendments Committee will find that the District Attorney's Office has now satisfied its obligations under the Public Records Act and the Sunshine Ordinance with regard to this request. Please do not hesitate to contact me if I can provide further information or be of assistance.

Sincerely,



PAUL HENDERSON  
Chief of Administration

cc: Kellee Lanza, MB Public Affairs Inc.

