

Date: Jan. 4, 2011

Item No. 23 & 24  
File No. 10064

## SUNSHINE ORDINANCE TASK FORCE

### AGENDA PACKET CONTENTS LIST\*

- Anonymous Tenants against the City Attorney's Office**
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Completed by: Chris Rustom

Date: Dec. 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  
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 CITY ATTORNEYS' OFFICE

Name of individual contacted at Department or Commission DCA FRANCESCA GESSNER -  
- AND CA DENNIS HERRERA

Alleged violation public records access  
 Alleged violation of public meeting. Date of meeting \_\_\_\_\_

Sunshine Ordinance Section 67.22(a), 67.24(a)(1), 67.24(b)(1)(ii)  
(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.

MS. GESSNER CLAIMS MY PUBLIC RECORDS REQUEST ARE  
INTERROGATORIES. ALL THE GOV. CODES SHE SITED DEAL  
WITH ACTUAL COURT CASES. SEE ATTACHED EMAILS. THIS IS  
NOT A COURT CASE AND IS ONLY PUBLIC RECORDS REQUEST.

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

(Optional)  
Name ANONYMOUS TENNANT'S Address \_\_\_\_\_

Telephone No. 415- [REDACTED] - [REDACTED] E-Mail Address [REDACTED]@YAHOO.COM

Date 11-16-10 \_\_\_\_\_

I request confidentiality of my personal information.  yes  no  
Signature \_\_\_\_\_

<sup>1</sup> 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).

## Complaint

Ms. Gessner claims items number 3, 4 and 5 of my email dated 10-22-2010 (attached) are privileged attorney work product and she cites several Government Codes. These codes deal with actual cases when a court case has been filed.

Ms. Gessner is standing behind the shield that everything she does is related to a court case premise and therefore privileged. If this is true then everything she does she will claim it's privileged.

**Ms. Gessner cited California Government Code 6254 (k):** 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.

**My request are not "Evidence" they are public records and procedures.**

California Government Code 6276.04

**Ms. Gessner cited this law and stated: "exempting from disclosure attorney work product." I couldn't find: "exempting from disclosure attorney work product." it looks like this is part of a sentence and she did not give the exact location or the entire sentence.**

California Government Code 2018.030

(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.

**Here again you can see in the body of the code it relates to court cases but if this was a court case the denial of this discovery will unfairly prejudice the people and will result in an injustice. This is not a court case.**

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". 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,

"[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 Ms. Gessner's email dated: October 25, 2010, her last paragraph is: "Finally, please be advised that, as I already stated at the October 20, 2010 Board of Appeals meeting, our office issued the October 6, 2010 opinion in accordance with the "Procedures and Guidelines for Issuing City Attorney Opinions," available on the City Attorney website at <http://www.sfcityattorney.org/Modules/ShowDocument.aspx?documentid=120>.

First thing this statement is inaccurate because Ms. Gessner did not follow these Procedures and Guidelines, she issued her opinion to the Board of Appeals and the public and then obtained approval from the City's Attorney, this is backwards. The Procedures state that she must obtain the City's Attorney approval before issuing her opinion to the Board of Appeals and public.

The PROCEDURES AND GUIDELINES FOR ISSUING CITY ATTORNEY OPINIONS state: "The central mission of the City Attorney's Office is to provide the highest quality legal advice to the City and County of San Francisco."

and

## **II. PROCEDURES FOR ISSUING PUBLIC OPINIONS**

".....the significance of the issue for good government or public information; and its precedential significance."

The City's Procedures and Guidelines state the mission of the City Attorney's Office: "is to provide the highest quality legal advice...." and ".....the significance of the issue for good government or public information."

Ms. Gessner's business practice by not following her offices procedures and by not allowing the public to review how she arrived to her inaccurate legal opinion is contrary to the PROCEDURES AND GUIDELINES FOR ISSUING CITY ATTORNEY OPINIONS. This is not good government and certainly is not the highest quality legal advice. We the public DO NOT have any ulterior motive or hidden agenda, the bottom line is we are trying to obtain public records and public information to make sure that the people of San Francisco rights are not being diluted.

I respectfully request the Task Force to determine under Section 67.21 which records are disclosable.

Sec. 67.21. Process For Gaining Access To Public Records; Administrative Appeals.

(e) If the custodian refuses, fails to comply, or incompletely complies with a request described in (b) above or if a petition is denied or not acted on by the supervisor of public records, the person making the request may petition the Sunshine Task Force for a determination whether the record requested is public

Thank you.



Tenants 769NorthPoint  
<tenants769np@yahoo.com>

11/19/2010 09:41 AM

To SOTF@SFGov.org

cc

bcc

Subject Fw: SUNSHINE REQUEST / IMMEDIATE DISCLOSURE  
REQUEST

Case #10064

----- Forwarded Message -----

**From:** Tenants 769NorthPoint <tenants769np@yahoo.com>

**To:** DENNIS.HERRERA@sfgov.org

**Cc:** Matt Dorsey <Matt.Dorsey@sfgov.org>; Allen Grossman <grossman356@me.com>; Kimo Crossman <kimo@webnetic.net>; rwhartzjr@sbcglobal.net; libraryusers2004@yahoo.com

**Sent:** Tue, November 9, 2010 9:08:39 AM

**Subject:** Fw: SUNSHINE REQUEST / IMMEDIATE DISCLOSURE REQUEST

SUNSHINE REQUEST / IMMEDIATE DISCLOSURE REQUEST (SR/IDR)

Honorable City Attorney Herrera,

Per Sunshine Ordinance you are the custodian of records and we ask you to instruct DCA Francesca Gessner to provide us the public records. Please review the string of emails below and my SR/IDR at the bottom.

Ms. Gessner claims items number 3, 4 and 5 of my email dated 10-22-2010 (attached) are privileged attorney work product and she cites several Government Codes. These codes deal with actual cases when a court case has been filed.

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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 Ms. Gessner's email dated: October 25, 2010, her last paragraph is: "Finally, please be advised that, as I already stated at the October 20, 2010 Board of Appeals meeting, our office issued the October 6, 2010 opinion in accordance with the "Procedures and Guidelines for Issuing City Attorney Opinions," available on the City Attorney website at <http://www.sfcityattorney.org/Modules/ShowDocument.aspx?documentid=120>.

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Thank you for your cooperation.

----- Forwarded Message -----

**From:** Francesca Gessner <Francesca.Gessner@sfgov.org>

**To:** Tenants 769NorthPoint <tenants769np@yahoo.com>

**Cc:** Matt Dorsey <Matt.Dorsey@sfgov.org>

**Sent:** Thu, November 4, 2010 11:35:07 AM

**Subject:** Re: SUNSHINE REQUEST / IMMEDIATE DISCLOSURE REQUEST

To Whom It May Concern:

On Friday October 22, 2010, you submitted an "immediate disclosure" request to our office, in which you made the following five inquiries: "1). Who is the team leader that must review and did review your opinion? 2). Who is the Chief Assistant City Attorney that the final draft of your opinion was submitted to? 3). Who are the deputies that reviewed your opinion? 4). A copy of the cover memorandum of no more than one page that was submitted with your opinion describing all the requirements under the heading Review and Approval by the Chief Assistant City Attorney. 5). Copies of any documents and/or statements in regards to the reviews by all the parties involved."

On Monday October 25, 2010, we responded to your inquiry. As we explained in that response, Items #1, #2, #3 are questions that do not ask to see public records. Although the public records law does not require us to answer such questions, we answered them as a courtesy. Specifically, with regard to Item #1, we informed you that Buck Delventhal is my team leader, and with regard to Item #2, we informed you that Jesse Smith is the Chief Assistant City Attorney. We also informed you that the October 6, 2010 City Attorney Opinion regarding the Board of Appeals was reviewed and approved in accordance with the "Procedures and Guidelines for Issuing City Attorney Opinions," available on the City Attorney website at <http://www.sfcityattorney.org/Modules/ShowDocument.aspx?documentid=120>.

We also explained in our October 25th response that any documents responsive to Items #3, #4 and #5 of your inquiry would be privileged attorney work product that is not subject to disclosure under the law. ( See Cal. Govt. Code § 6254(k) [public agencies not required to disclose documents where disclosure is exempted or prohibited by federal or state law]; Cal. Govt. Code § 6276.04 [exempting from disclosure attorney work product]; Cal. Code Civ. Proc. §2018.030 [attorney work product privilege].)

Accordingly, your public records request of October 22nd is satisfied in full compliance with relevant local and state law. Should you have further comments or complaints, you may feel free to address these to the City Attorney's Communications Director, Matt Dorsey, at matt.dorsey@sfgov.org.

Thank you,  
Francesca

Francesca Gessner, Deputy City Attorney  
Office of the City Attorney, General Government Team  
City and County of San Francisco  
City Hall, Room 234  
1 Dr. Carlton B. Goodlett Place  
San Francisco, CA 94102-4682  
Telephone 415-554-4762  
Facsimile 415-554-4699  
Francesca.Gessner@sfgov.org

**CONFIDENTIAL COMMUNICATION**

This message is subject to an attorney-client privilege and/or attorney work product privilege and must not be disclosed. If you received this e-mail inadvertently, please permanently delete it.

From: Tenants 769NorthPoint <tenants769np@yahoo.com>  
To: Francesca Gessner <Francesca.Gessner@sfgov.org>  
Cc: Allen Grossman <grossman356@me.com>, Kimo Crossman <kimo@webnetic.net>, rwhartzjr@sbcglobal.net, libraryusers2004@yahoo.com  
Date: 11/02/2010 10:25 AM  
Subject: Re: SUNSHINE REQUEST / IMMEDIATE DISCLOSURE REQUEST

---

Ms. Gessner,

In response to your email below, where you deny us the right to have public records and / or public information and where you try to interpret a Sunshine Request/Immediate Disclosure Request to be interrogatories and / or a court case, in regards to my: My Sunshine Request/Immediate Disclosure Request (SR/IDR) below.

This is public information and/or public records that you are required to answer.

How can you make a statement that these are interrogatories? There first has to be a case before you have interrogatories.

Also the the Government laws you cited are all related to existing court cases. No one has said anything about a court case, all we are trying to do is show you that the Board of Appeals is not in compliance with Section 108.8 Appeals Board of the 2007 California Building Codes.

We are entitled to our SR/IDR below, please provide us the public records and information as request below.

Thank you for your cooperation.

---

**From:** Francesca Gessner <Francesca.Gessner@sfgov.org>  
**To:** Tenants 769NorthPoint <tenants769np@yahoo.com>  
**Sent:** Mon, October 25, 2010 4:40:22 PM  
**Subject:** Re: SUNSHINE REQUEST / IMMEDIATE DISCLOSURE REQUEST

To Whom It May Concern:

I am in receipt of your immediate disclosure request emailed on Friday October 22, 2010. In that request, you made the following inquiries with regard to the October 6, 2010 City Attorney opinion regarding qualifications for members of the Board of Appeals: 1). Who is the team leader that must review and did review your opinion? 2). Who is the Chief Assistant City Attorney that the final draft of your opinion was submitted to? 3). Who are the deputies that reviewed your opinion? 4). A copy of the cover memorandum of no more than one page that was submitted with your opinion describing all the requirements under the heading Review and Approval by the Chief Assistant City Attorney. 5). Copies of any documents and/or statements in regards to the reviews by all the parties involved.

Inquiries #1, #2, and #3 do not constitute requests for public records, but are interrogatories to which the City is not required to respond under the Public Records Act or the Sunshine Ordinance. As a courtesy, however, I am providing the following responses to Inquiries #1 and #2: (1) Buck Delventhal is the Team Leader of the Government Team, of which I am a member, and (2) Jesse Smith is the Chief Assistant City Attorney.

Regarding Inquiries #3, #4, and #5, any information or documents responsive to these requests would be privileged attorney work product, which is protected from public disclosure under the law. See Cal. Govt. Code § 6254(k) (public agencies not required to disclose documents where disclosure is exempted or prohibited by federal or state law); Cal. Govt. Code § 6276.04 (exempting from disclosure attorney work product); Cal. Code Civ. Proc. §2018.030 (attorney work product privilege).

Finally, please be advised that, as I already stated at the October 20, 2010 Board of Appeals meeting, our office issued the October 6, 2010 opinion in accordance with the "Procedures and Guidelines for Issuing City Attorney Opinions," available on the City Attorney website at <http://www.sfcityattorney.org/Modules/ShowDocument.aspx?documentid=120>.

Please let me know if I can be of further assistance to you.

Thank you,

Francesca

Francesca Gessner, Deputy City Attorney  
Office of the City Attorney, General Government Team  
City and County of San Francisco  
City Hall, Room 234  
1 Dr. Carlton B. Goodlett Place  
San Francisco, CA 94102-4682  
Telephone 415-554-4762  
Facsimile 415-554-4699  
Francesca.Gessner@sfgov.org

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Cc: Kimo Crossman <kimo@webnetic.net>, Allen Grossman <grossman356@me.com>, rwhartzjr@sbcglobal.net, libraryusers2004@yahoo.com  
Date: 10/22/2010 08:03 AM  
Subject: SUNSHINE REQUEST / IMMEDIATE DISCLOSURE REQUEST

---

SUNSHINE REQUEST  
IMMEDIATE DISCLOSURE REQUEST

City Deputy Attorney Francesca Gessner,

In connection with your opinion dated October 6, 2010, addressed to the President and Commissioners of the Board of Appeals regarding qualifications, please provide us the following:

- 1). Who is the team leader that must review and did review your opinion?
- 2). Who is the Chief Assistant City Attorney that the final draft of your opinion was submitted to?

3). Who are the deputies that reviewed your opinion?

4). A copy of the cover memorandum of no more than one page that was submitted with your opinion describing all the requirements under the heading Review and Approval by the Chief Assistant City Attorney.

5). Copies of any documents and/or statements in regards to the reviews by all the parties involved.

Thank you.



Tenants 769NorthPoint  
<tenants769np@yahoo.com>

11/19/2010 09:38 AM

To: SOTF@SFGov.org

cc

bcc

Subject: Fw: SUNSHINE REQUEST / IMMEDIATE DISCLOSURE  
REQUEST

Case #10064

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**To:** Francesca Gessner <Francesca.Gessner@sfgov.org>

**Cc:** Allen Grossman <grossman356@me.com>; Kimo Crossman <kimo@webnetic.net>;  
rwhartzjr@sbcglobal.net; libraryusers2004@yahoo.com

**Sent:** Tue, November 2, 2010 10:25:11 AM

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Ms. Gessner,

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Tenants 769NorthPoint  
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11/19/2010 09:46 AM

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To Whom It May Concern:

On Friday October 22, 2010, you submitted an "immediate disclosure" request to our office, in which you made the following five inquiries: "1). Who is the team leader that must review and did review your opinion? 2). Who is the Chief Assistant City Attorney that the final draft of your opinion was submitted to? 3). Who are the deputies that reviewed your opinion? 4). A copy of the cover memorandum of no more than one page that was submitted with your opinion describing all the requirements under the heading Review and Approval by the Chief Assistant City Attorney. 5). Copies of any documents and/or statements in regards to the reviews by all the parties involved."

On Monday October 25, 2010, we responded to your inquiry. As we explained in that response, Items #1, #2, #3 are questions that do not ask to see public records. Although the public records law does not require us to answer such questions, we answered them as a courtesy. Specifically, with regard to Item #1, we informed you that Buck Delventhal is my team leader, and with regard to Item #2, we informed you that Jesse Smith is the Chief Assistant City Attorney. We also informed you that the October 6, 2010 City Attorney Opinion regarding the Board of Appeals was reviewed and approved in accordance with the "Procedures and Guidelines for Issuing City Attorney Opinions," available on the City Attorney website at <http://www.sfcityattorney.org/Modules/ShowDocument.aspx?documentid=120>.

We also explained in our October 25th response that any documents responsive to Items #3, #4 and #5 of your inquiry would be privileged attorney work product that is not subject to disclosure under the law. ( See Cal. Govt. Code § 6254(k) [public agencies not required to disclose documents where disclosure is exempted or prohibited by federal or state law]; Cal. Govt. Code § 6276.04 [exempting from disclosure attorney work product]; Cal. Code Civ. Proc. §2018.030 [attorney work product privilege].)

Accordingly, your public records request of October 22nd is satisfied in full compliance with relevant local and state law. Should you have further comments or complaints, you may feel free to address these to the City Attorney's Communications Director, Matt Dorsey, at [matt.dorsey@sfgov.org](mailto:matt.dorsey@sfgov.org).

Thank you,  
Francesca

Francesca Gessner, Deputy City Attorney



Tenants 769NorthPoint  
<tenants769np@yahoo.com>  
>  
11/19/2010 09:36 AM

To SOTF@SFGov.org  
cc  
bcc  
Subject Fw: SUNSHINE REQUEST / IMMEDIATE DISCLOSURE  
REQUEST

Case #10064

----- Forwarded Message -----

**From:** Francesca Gessner <Francesca.Gessner@sfgov.org>  
**To:** Tenants 769NorthPoint <tenants769np@yahoo.com>  
**Sent:** Mon, October 25, 2010 4:40:22 PM  
**Subject:** Re: SUNSHINE REQUEST / IMMEDIATE DISCLOSURE REQUEST

To Whom It May Concern:

I am in receipt of your immediate disclosure request emailed on Friday October 22, 2010. In that request, you made the following inquiries with regard to the October 6, 2010 City Attorney opinion regarding qualifications for members of the Board of Appeals: 1). Who is the team leader that must review and did review your opinion? 2). Who is the Chief Assistant City Attorney that the final draft of your opinion was submitted to? 3). Who are the deputies that reviewed your opinion? 4). A copy of the cover memorandum of no more than one page that was submitted with your opinion describing all the requirements under the heading Review and Approval by the Chief Assistant City Attorney. 5). Copies of any documents and/or statements in regards to the reviews by all the parties involved.

Inquiries #1, #2, and #3 do not constitute requests for public records, but are interrogatories to which the City is not required to respond under the Public Records Act or the Sunshine Ordinance. As a courtesy, however, I am providing the following responses to Inquiries #1 and #2: (1) Buck Delventhal is the Team Leader of the Government Team, of which I am a member, and (2) Jesse Smith is the Chief Assistant City Attorney.

Regarding Inquiries #3, #4, and #5, any information or documents responsive to these requests would be privileged attorney work product, which is protected from public disclosure under the law. See Cal. Govt. Code § 6254(k) (public agencies not required to disclose documents where disclosure is exempted or prohibited by federal or state law); Cal. Govt. Code § 6276.04 (exempting from disclosure attorney work product); Cal. Code Civ. Proc. §2018.030 (attorney work product privilege).

Finally, please be advised that, as I already stated at the October 20, 2010 Board of Appeals meeting, our office issued the October 6, 2010 opinion in accordance with the "Procedures and Guidelines for Issuing City Attorney Opinions," available on the City Attorney website at <http://www.sfcityattorney.org/Modules/ShowDocument.aspx?documentid=120>.

Please let me know if I can be of further assistance to you.

Thank you,  
Francesca

Francesca Gessner, Deputy City Attorney



Tenants 769NorthPoint  
<tenants769np@yahoo.com>  
>

11/19/2010 09:34 AM

To SOTF@SFGov.org

cc

bcc

Subject Fw: SUNSHINE REQUEST / IMMEDIATE DISCLOSURE  
REQUEST

Case #10064

----- Forwarded Message -----

**From:** Tenants 769NorthPoint <tenants769np@yahoo.com>

**To:** Francesca.Gessner@sfgov.org

**Cc:** Kimo Crossman <kimo@webnetic.net>; Allen Grossman <grossman356@me.com>;  
rwhartzjr@sbcglobal.net; libraryusers2004@yahoo.com

**Sent:** Fri, October 22, 2010 8:03:52 AM

**Subject:** SUNSHINE REQUEST / IMMEDIATE DISCLOSURE REQUEST

SUNSHINE REQUEST

IMMEDIATE DISCLOSURE REQUEST

City Deputy Attorney Francesca Gessner,

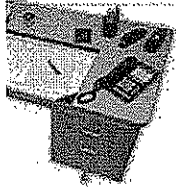
In connection with your opinion dated October 6, 2010, addressed to the President and Commissioners of the Board of Appeals regarding qualifications, please provide us the following:

- 1). Who is the team leader that must review and did review your opinion?
- 2). Who is the Chief Assistant City Attorney that the final draft of your opinion was submitted to?
- 3). Who are the deputies that reviewed your opinion?
- 4). A copy of the cover memorandum of no more than one page that was submitted with

your opinion describing all the requirements under the heading Review and Approval by the Chief Assistant City Attorney.

5). Copies of any documents and/or statements in regards to the reviews by all the parties involved.

Thank you.



Jack  
Song/CTYATT@CTYATT  
12/01/2010 03:10 PM

To SOTF/SOTF/SFGOV@SFGOV  
cc  
bcc  
Subject Re: Complaint #10064 - Anonymous Tenants v. City  
Attorney's Office

Honorable Members  
Complaint Committee  
Sunshine Ordinance Task Force  
Office of the Clerk, Board of Supervisors  
Room 244, City Hall  
1 Dr. Carlton B. Goodlett Place  
San Francisco, CA 94102-4689

Re: Complaint #10064 – *Anonymous Tenants v. City Attorney's Office*

December 1, 2010

Dear Complaint Committee Members:

On behalf of the City Attorney's Office, I write in response to Complaint #10064 filed by "Anonymous Tenants" (hereafter "complainant"). As explained below, one allegation in the Complaint concerns a matter that is outside of the Task Force's jurisdiction and therefore may not be considered by the Task Force. The remaining claims are based on a fundamental misunderstanding of the law and are without merit. When the Task Force hears the Complaint, it should dismiss it, in part on jurisdiction and in part on the merits.

**A. Complainant's Immediate Disclosure Request**

The Complaint pertains to an October 22, 2010 immediate disclosure request the complainant submitted to the City Attorney's Office. In that request, the complainant asked for certain information related to an October 6, 2010 City Attorney Opinion titled "Qualifications for Members of the Board of Appeals." That opinion is an official, public opinion of the City Attorney's Office and is posted on the City Attorney's website. Specifically, the complainant made the following five requests:

1. Who is the team leader that must review and did review your opinion?
2. Who is the Chief Assistant City Attorney that the final draft of your opinion was submitted to?
3. Who are the deputies that reviewed your opinion?
4. A copy of the cover memorandum of no more than one page that was submitted with your opinion describing all the requirements under the heading Review and Approval by the Chief Assistant City Attorney

5. Copies of any documents and/or statements in regards to the reviews by all the parties involved.

#### **B. City Attorney Response**

On October 25, 2010, the City Attorney's Office timely responded to the request. Our response pointed out that Items #1, #2, and #3 of the request did not constitute a request for identifiable records as the law requires, but were questions or interrogatories. Nevertheless, as a courtesy, we provided information responsive to these inquiries. Specifically, we informed the complainant that (1) Buck Delventhal is the Team Leader of the Government Team, of which Deputy City Attorney Francesca Gessner is a member (Ms. Gessner authored the October 6 City Attorney opinion at issue), and (2) Jesse Smith is the Chief Assistant City Attorney. As to Item #3, we explained that any written records showing which deputies reviewed the opinion would be privileged attorney work product. We also informed the complainant that the October 6 City Attorney opinion was reviewed and approved in accordance with our office's "Procedures and Guidelines for Issuing City Attorney Opinions," which is available to the public on the City Attorney website.

As to Items #3, #4, and #5, we explained that any information or documents responsive to these requests would be privileged attorney work product, which is protected from disclosure under the Public Records Act. In explaining the legal basis for this exemption, we cited Government Code §§ 6254(k) and 6276.04, and Code of Civil Procedure § 2018.030.

#### **C. The Complaint**

The Complaint appears to contain three allegations: (1) the City Attorney's Office did not follow its own procedures and guidelines when issuing the October 6 legal opinion, (2) the complainant's request did not constitute "interrogatories," and (3) the attorney work product privilege does not apply in the context of public records requests. The first allegation does not fall within the Task Force's jurisdiction, and the second and third allegations are without merit.

#### **D. The Task Force Does Not Have Jurisdiction Over The City Attorney's Internal Procedures For Issuing Legal Opinions**

The Complaint alleges that the City Attorney's Office did not follow its own procedures and guidelines in issuing the October 6 opinion. The Task Force does not have jurisdiction to review this allegation. The Task Force's jurisdiction concerns the Sunshine Ordinance, Public Records Act, and Brown Act. (See S.F. Admin. Code § 67.30(c).) The Sunshine Ordinance, Public Records Act and Brown Act do not regulate the internal procedures of the City Attorney's Office for the issuance of legal opinions. For this reason, the Task Force should decline to consider this claim. In any event, as we told the complainant in our October 25 response, our office fully complied with its policies and procedures in issuing the October 6 opinion.

**E. The Remaining Claims Are Without Merit**

**1. Although Items #1, #2, and #3 Did Not Properly Request Records, The City Attorney Voluntarily Provided Responsive Information Anyway**

On the Complaint Form, the complainant alleges that our office claimed his public records request constituted "interrogatories." He states that the term "interrogatories" can apply only to actual court cases, not to public records requests.

It appears the complainant may have misunderstood our reference to "interrogatories." We simply used the term to mean questions. A public records request must "reasonably describe an identifiable record or records ...." (Govt. Code § 6253(b).) In our October 25 response, we observed that Items #1 through #3 of complainant's request – "(1) Who is the team leader that must review and did review your opinion? (2) Who is the Chief Assistant City Attorney that the final draft of your opinion was submitted to? (3) Who are the deputies that reviewed your opinion?" – were not requests for existing public records as required by the law, but were merely questions.

In any event, although the law did not require us to do so, we answered complainant's questions in Items #1 and #2. As to Item #3, as explained below, we properly relied on the attorney work product privilege in declining to disclose which attorneys reviewed the opinion and/or any records that would reveal which attorneys reviewed the opinion.

**2. Items #3, #4, and #5 Seek Attorney Work Product Which Is Exempt From Disclosure**

The complainant alleges that the documents sought through Items #3, #4, and #5 of his request are not exempt from disclosure under the attorney work product doctrine. As the 2010-11 edition of the Good Government Guide, available on the City Attorney's Office website, explains, records that contain the work product of an attorney representing the City are protected from disclosure under Government Code §§ 6254(k) and 6276.04, and Code of Civil Procedure § 2018.030. (Good Government Guide, p. 95.) Complainant appears to believe that these three code provisions apply only in the context of litigation, and not public records requests. In order to clear up this confusion, we address each code section separately below.

**a. Government Code § 6254(k)**

Government Code Section 6254(k) is part of the California Public Records Act. It permits a public agency to withhold public "[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 complainant asserts that Section 6254(k) applies only to "evidence," and not to public records. He is mistaken. The statute references the Evidence Code as a non-exclusive example of the type of state law exemptions that may apply in the public records context. The

use of the phrase "including, but not limited to," makes this clear. Under the plain language of the statute, this provision pertains to *any* "records" that are exempt from disclosure under *any* "state law." As explained below, Government Code § 6276.04 and Code of Civil Procedure § 2018.030 are state laws that exempt attorney work product from disclosure.

**b. Government Code § 6276.04**

The complainant also asserts that Section 6276.04 does not exempt from disclosure attorney work product. Again, the complainant is misreading the law.

Section 6276.04 is part of the California Public Records Act and is titled "Records Or Information Not Required To Be Disclosed." It contains a non-exclusive, alphabetical list of records that are exempt from disclosure under Section 6254(k) of the Act. The introductory language to Section 6276 provides: "Records or information not required to be disclosed pursuant to subdivision (k) of Section 6254 may include, but shall not be limited to, records or information identified in statutes listed in this article." Section 6276.04, which lists records not subject to disclosure, includes "attorney work product confidentiality." Therefore, under the plain terms of Section 6276, records or information containing attorney work product is exempt from disclosure under the Public Records Act.

**c. Code of Civil Procedure § 2018.030 -- Attorney Work Product Privilege**

Section 6276.04 enumerates attorney work product records among those records not subject to disclosure under the Public Records Act. That section in turn refers to Code of Civil Procedure Section 2018.030, which defines attorney work product as follows:

(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 complainant appears to believe that because Section 2018.030 refers to discovery, it applies only in the context of lawsuits and discovery requests, and not public records requests. But Sections 6254(k) and 6276.04 – the latter by its express terms – clearly exempt attorney work product *under the Public Records Act*. The Public Records Act does not regulate access to records in litigation discovery. Accordingly, California courts apply the work product privilege to exempt records from disclosure in the context of public records requests. (See e.g., *County of Los Angeles v. Superior Court (Axelrad)* (2000) 82 Cal.App.4th 819, 833 [holding in a context other than litigation that a public agency may rely on the attorney work product privilege to decline to disclose a document].)



Moreover, the attorney work product 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." (*Axelrad, supra*, 82 Cal.App.4th at p. 833; see also Good Government Guide at p. 95 ["unlike the pending litigation exception, the attorney work product privilege extends beyond records prepared for litigation purposes"].) The privilege is held by the attorney who generated the work product (*Lasky v. Superior Court* (1985) 172 Cal.App.3d 264, 272, fn.2), and protects the "mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case." (*Hobbs v. Municipal Court* (1991) 233 Cal.App.3d 670, 692.) The privilege therefore "promote[s] effective legal representation through full investigation of facts and research and analysis of applicable laws, be they favorable or unfavorable to the client's interest." (*Lasky v. Superior Court, supra*, at p. 272, fn.2.)

Any documents that would be responsive to Item #3 (the deputies who reviewed the legal opinion), Item #4 (the deputy city attorney's cover memorandum to the Chief Assistant City Attorney), and Item #5 (documents and/or statements relating to the reviews by all the parties involved) would consist of internal attorney correspondence and preliminary drafts containing the comments, thoughts, and legal research of deputy city attorneys working on the matter. Because such records are writings reflecting the "impressions, conclusions, opinions, or legal research or theories" of the deputy city attorneys working on the matter, they constitute attorney work product. (Code Civ. Proc. § 2018.030.) In fact, the Task Force has already ruled that these types of records constitute attorney work product that are not subject to disclosure. In *Allen Grossman v. Office of the City Attorney* (08039), the complainant sought memoranda, e-mails or other communications to, from or among deputy city attorneys regarding an official letter issued by the City Attorney's Office, as well as preliminary drafts of the letter. The Task Force ruled that communications and drafts pertaining to the letter issued by the City Attorney's Office are protected attorney work product and not subject to disclosure. Attached for your reference is a copy of the Task Force's Order of Determination in that case.

Similarly, the courts have expressly recognized that these types of internal attorney memoranda, correspondence and notes fall squarely within the attorney work product privilege. (See e.g., *Hickman v. Taylor* (1947) 329 U.S. 495, 511 [observing that attorney work product includes attorney "memoranda" and "correspondence"]; *Lasky v. Superior Court, supra*, 172 Cal.App.3d at p. 286 [holding that internal communications between attorneys generated in the process of counseling a client to act as a trustee are privileged work product]; *Popelka, Allard, McCowan & Jones v. Superior Court* (1980) 107 Cal.App.3d 496, 500 [holding that law firm's interoffice memos concerning a previous case are privileged attorney work product].) Therefore, this office properly relied on the work product privilege in declining to respond to this request.

#### F. Conclusion

To the extent the Complaint concerns whether our office followed its internal procedures for issuing a legal opinion, the Task Force does not have jurisdiction to consider that allegation. The remaining claims in the Complaint are based on a fundamental misunderstanding of the relevant law and should be rejected on the merits.

Thank you for your time and consideration.

Sincerely,

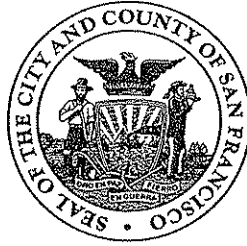
JACK SONG  
Public Information Officer  
Office of City Attorney Dennis Herrera

Attachments: Order of Determination (*Allen Grossman v. City Attorney* [08039])



08039\_Allen\_Grossman\_v\_City\_Attorney's\_Office.pdf

**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 10, 2008

**DATE THE DECISION ISSUED**  
October 28, 2008

*ALLEN GROSSMAN v. OFFICE OF THE CITY ATTORNEY (08039)*

**FACTS OF THE CASE**

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, 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 to 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 Zarefsky 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".

**COMPLAINT FILED**

On July 30, 2008, Allen 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

**HEARING ON THE COMPLAINT**

On October 28, 2008, Allen Grossman appeared before the Task force and stated that the requested draft documents and communications were subject to disclosure because, even if they were attorney work-product, they must be released under 67.24(b)(ii) and (b)(iii).

**ORDER OF DETERMINATION**

Respondent Virginia Dario Elizondo of the City Attorney's Office said the communications and drafts pertaining to the letter are protected attorney work-product because they are the thoughts, impressions and thoughts of attorneys and, therefore, are exempt from disclosure.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Based on the testimony and evidence presented, the Task Force finds that communications and drafts pertaining to the letter issued by the City Attorney's Office are protected attorney work product and not subject to disclosure under section 67.24(b)(ii) because they were work-product materials when created and not subject to disclosure under section 67.24(b)(iii) because the drafts and communications did not reflect the final opinion or analysis of the City Attorney's office.

**DECISION AND ORDER OF DETERMINATION**

The Task Force after much extended discussion found that the work-product doctrine applied in this case and the withheld documents were exempt from disclosure

This Order of Determination was adopted by the Sunshine Ordinance Task Force on October 28, 2008, by the following vote: ( Goldman / Knoebber )

Ayes: Craven, Knee, Cauthen, Washburn, Knoebber, Chu, Chan, Goldman  
Noes: Johnson, Williams



Kristin Murphy Chu, Chair  
Sunshine Ordinance Task Force

c: Ernie Llorente, Deputy City Attorney  
Allen Grossman, Complainant  
Virginia Dario Elizondo, Deputy City Attorney