

Date: Jan. 20, 2011

Item No. 1 & 2

File No. 10057

SUNSHINE ORDINANCE TASK FORCE

AGENDA PACKET CONTENTS LIST*

- Rita O'Flynn v Controller's Whistleblower Program**
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Completed by: Chris Rustom

Date: Jan. 14, 2011

***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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City Attorney

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MEMORANDUM

January 4, 2011:

RITA O'FLYNN VS. CONTROLLER'S OFFICE (10057)

COMPLAINT

THE COMPLAINANT ALLEGES THE FOLLOWING:

Complainant Rita O'Flynn alleges that the San Francisco Controller violated the Ordinance by failing to provide records in response to her Immediate Disclosure Request ("IDR") for "all materials/documents related to [Complaint #3026 to the Controller]; including but not limited to letters, e-mail, meeting notes, phone reports, etc."

COMPLAINANT FILES COMPLAINT:

On October 26, 1010, Complainant filed a complaint with the Task Force alleging a violation of Sections 67.24, 67.26, and 67.27 of the Ordinance.

JURISDICTION

The Controller is a charter department under the Ordinance. The Task Force therefore generally has jurisdiction to hear a complaint against the Controller.

The Controller argues in its response to the Complaint that the IDR relates to records of an investigation under the Controller's Whistleblower Program, established by Charter Amendment and codified at Charter Section F1.100, *et seq.* It further argues that Section F1.110 provides that documents related to such investigations "shall be confidential," and concludes from this that the Task Force lacks jurisdiction to hear and adjudicate the complaint.

Although the Controller raises significant issues with regard to whether the records requested by Complainant are required to be disclosed, and thus whether the Controller violated the Ordinance by failing to provide the records in response to the IDR, that is a different issue from whether the Task Force has jurisdiction to hear the complaint. Nothing in the above cited charter sections says the Task Force lacks jurisdiction to hear a complaint about records reviewed by the Controller in connection with a whistleblower complaint. Given this, it would appear that the Task Force has jurisdiction to hear this complaint.

The Complaint Committee found that the Task Force has jurisdiction to hear this matter and referred it to the full Task Force for hearing.

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APPLICABLE STATUTORY SECTION(S):

S.F. Administrative Code Sections 67.24, 67.26, and 67.27.
SF Charter Sections F1.107, F1.110
Cal. Gov't Code Section 6254(k)
Evidence Code Section 1040

APPLICABLE CASE LAW:

See case law cited in analysis, below.

ISSUES TO BE DETERMINED**Uncontested Facts:**

On September 9, 2010, Ms. O'Flynn made an Immediate Disclosure Request ("IDR") to Tonia Lediju of the Controller's Office for "all materials/documents related to [Complaint # 3026 to the Controller's Whistleblower Program], including but not limited to letters, email, meeting notes, phone reports, etc." Later that same day, Ms. O'Flynn "further clarified" her IDR by requesting from the Controller 1) "each one of the documents relied on in making your determination as to each one of my claims" and 2) "the written analysis which formed the basis of your determination in regard to each of my claims." She then restated the claims she had made earlier to the Controller that apparently formed the basis of her whistleblower complaint.

That same day, Randolph Minnis of the Controller's Whistleblower Complaints Unit responded to Complainant by telephone and by email. Mr. Minnis informed Complainant that the Controller would not be providing the requested documents. Mr. Minnis' 9/9/10 email laid out in some detail the legal justification for the Controller's claim that the documents were exempt from disclosure under the Sunshine Ordinance. In brief, the Controller argued: 1) that information obtained as a part of the Controller's Whistleblower Program was made confidential under the terms of Charter Section F.100, et seq.; 2) that information gathered as a part of that program is "official information" protected from disclosure as privileged by Evidence Code 1040, and that 3) Gov't Code Section 6254(k) exempts from disclosure records covered by Evidence Code provisions establishing privileges against disclosure.

Complainant continued to press for disclosure of the requested documents, including expressly waiving any rights she may have as a whistleblower to confidentiality, and also pressed for a citation to a provision of the Sunshine Ordinance justifying the withholding of the requested documents.

QUESTIONS THAT MIGHT ASSIST IN DETERMINING FACTS:

- What records exist, if any, that are responsive to the request?
- Are there responsive documents other than those provided by the Complainant to the Controller?
- What is the nature of these records?

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LEGAL ISSUES/LEGAL DETERMINATIONS:

- Does section F1.110(b) of the Charter exempt records relating to an investigation by the Controller of a whistleblower complaint from disclosure under the Sunshine Ordinance?
- Do the documents withheld from disclosure by the Controller constitute "official information" under Evidence Code Section 1040?
- Are documents which constitute "official information" under Evidence Code Section 1040 exempted from disclosure by Gov't Code Section 6254(k)?
- If so, does Administrative Code Section 67.27(a) or (b) provide that withholding such information is justified?
- Does Administrative Code Section 67.24(i) prevent the application of an exemption under Evidence Code Section 1040 and Gov't Code Section 6254(k)?

SUGGESTED ANALYSIS

Section F1.110(b) of the Charter provides in relevant part: "Notwithstanding any other provision of this Charter, or any ordinance or regulation of the City and County of San Francisco, and except to extent required by state or federal law, all drafts, notes, preliminary reports of Controller's benchmark studies, audits, investigations and other reports shall be confidential." As a Charter provision, this section would override the Sunshine Ordinance to the extent the two are in conflict. However, Section 67.27 of the Sunshine Ordinance allows for "withholding under a specific permissive exemption in the California Public Records Act, or elsewhere, which permissive exemption is not forbidden to be asserted by this ordinance, [or for] withholding on the basis that disclosure is prohibited by law, . . . [citing] the specific statutory authority." Assuming the documents sought here fall within the category specifically protected by Charter Section F1.110(b), i.e., "drafts, notes, . . . audits, investigations, and other reports" related to the whistleblower complaint, the question arises whether they fall within the exception to this provision for documents "required [to be made public] by state or federal law."

We are unaware of any federal law provision that would require such records to be made public. Whether the exception applies thus may turn on whether the California Public Records Act requires disclosure of such records. Section 6726.04 of the Public Records Act specifically provides that documents that constituted "official information" are exempt from disclosure as public records. That section in turn refers to Evidence Code Section 1040, which defines "official information" to mean information "acquired in confidence by a public employee in the course of his or her duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made."

However, Section 1040 (b) further provides that the privilege may be asserted by a public entity only under certain circumstances: "(1) Disclosure is forbidden by an act of the Congress of the United States or a statute of this state; or (2) Disclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice; []." Subsection (b)(1) does not apply, leaving subsection (b)(2). That subsection requires a balancing test that weighs the

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necessity for disclosure "in the interests of justice" against the "necessity for preserving the confidentiality of the information." Thus, the privilege is a conditional one.

Nevertheless, one court has held that Section 1040 is not intended to allow for "fishing expeditions," but requires that the person seeking the official information must first make a requisite showing of their need for the information "in the interests of justice." *People v. Superior Court* (1971) 19 Cal. App. 3d 522, 530. However, another court reviewed a claim of privilege under Gov't Code Section 6254(k) and Evidence Code Section 1040 and held that "the privilege that section 6254, subdivision (k) incorporates should be applied conditionally on a clear showing that disclosure is against the public's interest." *San Gabriel Tribune v. Superior Court* (1983) 143 Cal. App. 3d 762, 777. Two questions present themselves from these cases: First, has Complainant made the requisite showing that her need for the information is "in the interests of justice"? If so, the second question is whether the Controller has made a "clear showing that disclosure is against the public's interest"? If not, the exemption claimed by the Controller would not appear to apply. If so, the exemption would apply.

Complainant asserts that even if the above requirements are met, Sunshine Ordinance sections 67.24(g) and (i) prohibit invocation of the exemption set forth in section 6254 of the Public Records Act. However, the inquiry under the Charter provision is simply whether State (or federal) law *requires* disclosure. Only if it does is the document outside the confidentiality imposed by Charter section F1.110(b). Insofar as the Sunshine Ordinance would require disclosure regardless of state law, it is preempted by the Charter.

Put simply, if the Controller were prohibited by the Sunshine Ordinance from withholding documents related to its investigation of whistleblower complaints, this would have the effect of eviscerating the confidentiality provisions of the Charter sections establishing confidentiality with respect to investigations. Where an ordinance and the Charter are in conflict, the Charter must prevail. *City and County of San Francisco v. Patterson* (1988) 202 Cal.App.3d 95, 102-103. The Controller therefore cannot be prohibited by the Sunshine Ordinance from asserting this exemption, if it is otherwise available and not prohibited by state or federal law.

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

SEC. 67.21. - PROCESS FOR GAINING ACCESS TO PUBLIC RECORDS; ADMINISTRATIVE APPEALS.

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

(b) A *custodian of a public record* shall, as soon as possible and within ten days following receipt of a request for inspection or copy of a public record, comply with such request. Such request may be delivered to the office of the custodian by the requester orally or in writing by fax, postal delivery, or e-mail. If the custodian believes the record or information requested is not a public record or is exempt, the custodian shall justify withholding any record by demonstrating, in writing as soon as possible and within ten days following receipt of a request, that the record in question is exempt under express provisions of this ordinance.

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

(d) If the custodian refuses, fails to comply, or incompletely complies with a request described in (b), the person making the request may petition the *supervisor of records* for a determination whether the record requested is public. The supervisor of records shall inform the petitioner, as soon as possible and within 10 days, of its determination whether the record requested, or any part of the record requested, is public. Where requested by the petitioner, and where otherwise desirable, this determination shall be in writing. Upon the determination by the supervisor of records that the record is public, the supervisor of records shall immediately order the custodian of the public record to comply with the person's request. If the custodian refuses or fails to comply with any such order within 5 days, the supervisor of records shall notify the district attorney or the attorney general who shall take whatever measures she or he deems necessary and appropriate to insure compliance with the provisions of this ordinance.

(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. The Sunshine Task Force shall inform the petitioner, as soon as possible and within 2 days after its next meeting but in no case later than 45 days from when a petition in writing is received, of its determination whether the record requested, or any part of

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the record requested, is public. Where requested by the petition, and where otherwise desirable, this determination shall be in writing. Upon the determination that the record is public, the Sunshine Task Force shall immediately order the custodian of the public record to comply with the person's request. If the custodian refuses or fails to comply with any such order within 5 days, the Sunshine Task Force shall notify the district attorney or the attorney general who may take whatever measures she or he deems necessary to insure compliance with the provisions of this ordinance. The Board of Supervisors and the City Attorney's office shall provide sufficient staff and resources to allow the Sunshine Task Force to fulfill its duties under this provision. Where requested by the petition, the Sunshine Task Force may conduct a public hearing concerning the records request denial. An authorized representative of the custodian of the public records requested shall attend any hearing and explain the basis for its decision to withhold the records requested.

SEC. 67.24. PUBLIC INFORMATION THAT MUST BE DISCLOSED.

Notwithstanding a department's legal discretion to withhold certain information under the California Public Records Act, the following policies shall govern specific types of documents and information and shall provide enhanced rights of public access to information and records:

- (g) Neither the City nor any office, employee, or agent thereof may assert California Public Records Act Section 6255 or any similar provision as the basis for withholding any documents or information requested under this ordinance.
- (h) Neither the City nor any office, employee, or agent thereof may assert an exemption for withholding for any document or information based on a "deliberative process" exemption, either as provided by California Public Records Act Section 6255 or any other provision of law that does not prohibit disclosure.
- (i) Neither the City, nor any office, employee, or agent thereof, may assert an exemption for withholding for any document or information based on a finding or showing that the public interest in withholding the information outweighs the public interest in disclosure. All withholdings of documents or information must be based on an express provision of this ordinance providing for withholding of the specific type of information in question or on an express and specific exemption provided by California Public Records Act that is not forbidden by this ordinance.

SEC. 67.27. JUSTIFICATION OF WITHHOLDING.

Any withholding of information shall be justified, in writing, as follows:

- (a) A withholding under a specific permissive exemption in the California Public Records Act, or elsewhere, which permissive exemption is not forbidden to be asserted by this ordinance, shall cite that authority.
- (b) A withholding on the basis that disclosure is prohibited by law shall cite the specific statutory authority in the Public Records Act or elsewhere.
- (c) A withholding on the basis that disclosure would incur civil or criminal liability shall cite any specific statutory or case law, or any other public agency's litigation experience, supporting that position.

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(d) When a record being requested contains information, most of which is exempt from disclosure under the California Public Records Act and this Article, the custodian shall inform the requester of the nature and extent of the nonexempt information and suggest alternative sources for the information requested, if available.

SAN FRANCISCO CHARTER**§ FL.107. - CITIZENS' COMPLAINTS; WHISTLEBLOWERS.**

(c) The Board of Supervisors shall enact and maintain an ordinance protecting the confidentiality of whistleblowers, and protecting City officers and employees from retaliation for filing a complaint with, or providing information to, the Controller, Ethics Commission, District Attorney, City Attorney or a City department or commission about improper government activity by City officers and employees.

FL.110. - ACCESS TO RECORDS; PRELIMINARY REPORTS.

(b) Notwithstanding any other provision of this Charter, or any ordinance or regulation of the City and County of San Francisco, and except to the extent required by state or federal law, all drafts, notes, preliminary reports of Controller's benchmark studies, audits, investigations and other reports shall be confidential.

CAL. GOV'T CODE §§ 6250 et seq. (Public Records Act)**§ 6254. EXEMPTION OF PARTICULAR RECORDS**

(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.

§ 6255. JUSTIFICATION FOR WITHHOLDING OF RECORDS

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

ARTICLE 2. OTHER EXEMPTIONS FROM DISCLOSURE**III. § 6275. LEGISLATIVE INTENT; EFFECT OF LISTING IN ARTICLE**

It is the intent of the Legislature to assist members of the public and state and local agencies in identifying exemptions to the California Public Records Act. It is the intent of the Legislature that, after January 1, 1999, each addition or amendment to a statute that exempts any information contained in a public record from disclosure pursuant to subdivision (k) of Section 6254 shall be listed and described in this article. The statutes listed in this article may operate to exempt certain records, or portions thereof, from disclosure. The statutes listed and described may not be inclusive of all exemptions. The listing of a statute in this article does not itself create an

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exemption. Requesters of public records and public agencies are cautioned to review the applicable statute to determine the extent to which the statute, in light of the circumstances surrounding the request, exempts public records from disclosure.

J.J. § 6276. RECORDS OR INFORMATION NOT REQUIRED TO BE DISCLOSED

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.

§ 6276.32. "NARCOTIC ADDICT OUTPATIENT REVOCATION PROCEEDING" TO "OSTEOPATHIC PHYSICIAN AND SURGEON"

Official information acquired in confidence by public employee, disclosure of, Sections 1040 and 1041, Evidence Code.

CAL. EVIDENCE CODE**SECTION 1040. OFFICIAL INFORMATION**

(a) As used in this section, "official information" means information acquired in confidence by a public employee in the course of his or her duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made.

(b) A public entity has a privilege to refuse to disclose official information, and to prevent another from disclosing official information, if the privilege is claimed by a person authorized by the public entity to do so and:

(1) Disclosure is forbidden by an act of the Congress of the United States or a statute of this state; or

(2) Disclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice; but no privilege may be claimed under this paragraph if any person authorized to do so has consented that the information be disclosed in the proceeding. In determining whether disclosure of the information is against the public interest, the interest of the public entity as a party in the outcome of the proceeding may not be considered.



DENNIS J. HERRERA
City Attorney

JERRY THREET
Deputy City Attorney

Direct Dial: (415) 554-3914
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MEMORANDUM

TO: Sunshine Ordinance Task Force
FROM: Jerry Threet
Deputy City Attorney
DATE: December 10, 2010
RE: *Complaint 10057: Rita O'Flynn v. San Francisco Controller*

Background

Complainant Rita O'Flynn alleges that the San Francisco Controller violated the Ordinance by failing to respond to her Immediate Disclosure Request ("IDR") for "all materials/documents related to [Complaint #3026 to the Controller], including but not limited to letters, e-mail, meeting notes, phone reports, etc."

Complaint

On October 26, 2010, Complainant filed a complaint with the Task Force alleging a violation of Sections 67.24, 67.26, and 67.27 of the Ordinance.

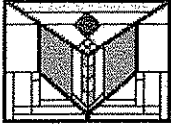
Discussion and Analysis

The Controller is a charter department under the Ordinance. The Task Force therefore generally has jurisdiction to hear a complaint against the Controller.

The Controller argues in its response to the Complaint that the IDR relates to records of an investigation under the Controller's Whistleblower Program, established by Charter Amendment and codified at Charter Section F1.107. It further argues that Section F1.110 provides that documents related to such investigations "shall be confidential," and concludes from this that the Task Force lacks jurisdiction to hear and adjudicate the complaint.

Although the Controller raises difficult and significant issues with regard to whether the records requested by Complainant are required to be disclosed, and thus whether the Controller violated the Ordinance by failing to provide the records in response to the IDR, that is a different issue from whether the Task Force has jurisdiction to hear the complaint. Nothing in the above cited charter sections says the Task Force lacks jurisdiction to hear a complaint about records reviewed by the Controller in connection with a whistleblower complaint; nor do they specify that records reviewed by the Controller in this context, if they otherwise would be public records, lose that status because they were a part of the whistleblower review. Given this, it would appear that the Task Force has jurisdiction to hear this complaint.¹

¹ This conclusion does not speak to the merit of the arguments made by the Controller as to whether there is a violation of the Ordinance. This issue will be more fully analyzed in the memorandum to the full Task Force related to the substance of the complaint if jurisdiction is found by the Complaint Committee.



whistleblower/CON/SFGOV

Sent by: Randolph
Minnis/CON/SFGOV

12/21/2010 03:28 PM

To SOTF/SOTF/SFGOV@SFGOV

cc whistleblower/CON/SFGOV@SFGOV, Tonia
Lediju/CON/SFGOV@SFGOV

bcc

Subject RE: Complaint #10057

This e-mail is to confirm submission to the Sunshine Task Force (SOTF) of the attached response to complaint number #10057.

The Office of the Controller - City Services Auditor (Whistleblower Program) contests the jurisdiction of SOTF in relation to the release of confidential whistleblower work product. The Whistleblower Program also contests the merits on which the complainant has requested confidential whistleblower work product be made public.



The SOTF will find the programs response in the attached document. Hearing Submission.doc

Respectfully;

Tonia Lediju
Director of Audits
City Services Auditor
415-554-5393

Confidentiality notice: the information in this email contains confidential whistleblower information. If you received this email inadvertently, please permanently delete it.

Sunshine Ordinance Task Force
c/o Chris Rustom, Clerk
1 Dr. Carlton B. Goodlett Place
City Hall, Room 244
San Francisco, CA 94102-4689

Re: Complaint #10057 Rita O'Flynn v. Office of the Controller

Dear Members of the Sunshine Ordinance Task Force:

The complaint in this matter concerns Ms. O'Flynn's request to the Controller for all records involving a whistleblower investigation. The Controller's Whistleblower Program operates pursuant to a Charter amendment approved by the voters in 2003.

To be effective, whistleblower programs must keep information confidential. If whistleblower programs did not zealously maintain confidentiality, those with incriminating or other damaging information would not come forward to report wrongdoing or cooperate with the investigation of alleged misconduct. Information from whistleblower investigations may only be disclosed if the investigation results in a finding of misconduct, and then may be disclosed only for the purpose of disciplinary or remedial action.

When the voters approved the Charter amendment requiring the Controller to establish a whistleblower program, they made records relating to investigations confidential. Like San Francisco, other public entities keep records of whistleblower investigations confidential.

We now set forth the provisions of the Charter and implementing local law that apply to the records at issue in this matter. In declining to provide whistleblower records to the complainant, the Controller's Office acted in compliance with these laws. The Task Force should decline to take jurisdiction over the complaint because the Task Force, like the Controller's Office, is subject to these laws. If the Task Force nonetheless elects to exercise jurisdiction, it should dismiss the complaint.

San Francisco Charter Section F1.110 and Implementing Local Law Make Whistleblower Records Confidential

The San Francisco Charter requires the Controller to operate a whistleblower program and to maintain the confidentiality of whistleblower investigations.

San Francisco Charter section F1.107(c). Notwithstanding any provision of this Charter, including, but not limited to Section C3.699-11, or any ordinance or regulation of the City and County of San Francisco, the Controller shall administer a whistleblower and citizen complaint hotline telephone number and website and publicize the hotline and website through press releases, public advertising, and communications to City employees. [Underlining added.]

San Francisco Charter Section F1.110. (a) The Controller shall have timely access to all records and documents the Controller deems necessary to complete the inquiries and reviews required by this Appendix. If a City officer, employee, agency, department, commission, or agency does not comply with the Controller's request for such records and documents, the Controller may issue a subpoena. The provisions of this subdivision shall not apply to those records and documents of City agencies for which a claim of privilege has been properly and appropriately raised, or which are prepared or maintained by the City Attorney, the District Attorney, or the Ethics Commission for use in any investigation authorized by federal, state law or local law.

(b) Notwithstanding any other provision of this Charter, or any ordinance or regulation of the City and County of San Francisco, and except to the extent required by state or federal law, all drafts, notes, preliminary reports of Controller's benchmark studies, audits, investigations and other reports shall be confidential. [Underlining added.]

In 2008, the Board of Supervisors adopted an ordinance governing the Controller's Whistleblower Program. Campaign and Governmental Conduct Code Section 4.123 provides as follows :

**CONFIDENTIALITY PROTECTION FOR WHISTLEBLOWER PROGRAM
COMPLAINANTS AND INVESTIGATIONS.**

(a) **WHISTLEBLOWER IDENTITY AND INVESTIGATIONS.** Every officer and employee of the City shall keep confidential:

(i) The identity of any person who makes a complaint to the Whistleblower Program under Section 4.107 of this Chapter, and any information that would lead to the disclosure of the person's identity, unless the person who made the complaint provides written authorization for the disclosure.

(ii) Complaints or reports to the Whistleblower Program and information related to the investigation of the matter, including drafts, notes, preliminary reports, working papers, records of interviews, communications with complainants and witnesses, and any other materials and information gathered or prepared in the course of the investigation.

The protection of confidentiality set forth in this Section applies irrespective of whether the information was provided in writing and whether the information was provided or is maintained in electronic, digital, paper or any other form or medium.

(b) **INQUIRY REGARDING IDENTITY PROHIBITED.** In order to assure effective implementation of the provisions of this Section providing confidentiality to whistleblowers, City officers and employees may not use any City resources, including work time, to ascertain or attempt to ascertain directly or indirectly the identity of any person who has made a complaint to the Whistleblower Program, unless such person has provided written authorization for the disclosure. Nothing in this Section shall preclude an officer or employee assigned to investigate a complaint under this Chapter from ascertaining the identity of a complainant to the extent necessary to conduct the investigation.

(c) **EXCEPTIONS.** Nothing in this Section shall preclude the Controller from (i) disclosing the identity of a person or other information to the extent necessary to conduct a civil or criminal investigation or to take any enforcement action, including any action to discipline an employee or take remedial action against a contractor, or (ii) releasing information as part of a referral when referring any matter to another City department, commission, board, officer or employee, or to other governmental agencies, for investigation and possible disciplinary, enforcement or remedial action, or (iii) releasing information to the Citizens Audit Review Board so that it may carry out its duty to provide advisory input to the Controller on the Whistleblower Program, provided that information is prepared so as to protect the confidentiality of persons making complaints and of investigations, or (iv) releasing information to inform the public of the nature of the actions taken by the Controller in the operation of the Whistleblower Program

provided that information is prepared so as to protect the confidentiality of persons making complaints and of investigations. [Underlining added.]

State Law Makes Records of the State's Whistleblower Program Confidential

San Francisco is not alone in adopting strong confidentiality protections for whistleblower programs. The California Legislature has authorized a whistleblower program, making the State Auditor responsible for implementing the program. Cal. Gov. Code § 8547.4. When it created the State's whistleblower program, the Legislature adopted findings to support the need for confidentiality:

Government Code Section 8547.1. Legislative findings and declarations.

The Legislature finds and declares that state employees should be free to report waste, fraud, abuse of authority, violation of law, or threat to public health without fear of retribution. The Legislature further finds and declares that public servants best serve the citizenry when they can be candid and honest without reservation in conducting the people's business.

The State's whistleblower program – like San Francisco's – limits the public's access to records of whistleblower investigations. As the following provisions show, the governing statutes narrowly circumscribes who may release information and for what purpose:

Government Code Section 8547.6. Assistance in conducting investigation; confidential information.

The State Auditor may request the assistance of any state department, agency, or employee in conducting any investigation required by this article. If an investigation conducted by the State Auditor involves access to confidential academic peer review records of University of California academic personnel, these records shall be provided in a form consistent with university policy effective on August 1, 1992. No information obtained from the State Auditor by any department, agency, or employee as a result of the State Auditor's request for assistance, nor any information obtained thereafter as a result of further investigation, shall be divulged or made known to any person without the prior approval of the State Auditor.

Government Code Section 8547.7. Report of improper governmental activities; enforcement authority.

(a) If the State Auditor determines that there is reasonable cause to believe that an employee or state agency has engaged in any improper governmental activity, he or she shall report the nature and details of the activity to the head of the employing agency, or the appropriate appointing authority, and may include recommended actions to prevent the continuation or recurrence of the activity. If appropriate, the State Auditor shall report this information to the Attorney General, the policy committees of the Senate and Assembly having jurisdiction over the subject involved, and to any other authority that the State Auditor determines appropriate.

(b) The State Auditor shall not have any enforcement power. In any case in which the State Auditor submits a report of alleged improper activity to the head of the employing agency or appropriate appointing authority, that individual shall report to the State Auditor with respect to any action taken by the individual regarding the activity, the first report being transmitted no later than 60 days after the date of the State Auditor's report and monthly thereafter until final action has been taken.

(c) The State Auditor shall keep confidential every investigation, including, but not limited to, all investigative files and work product, except that the State Auditor may issue any report of an investigation that has been substantiated, keeping confidential the

identity of the individual or individuals involved, or, subject to the limitations of Section 8547.5, release any findings or evidence supporting any findings resulting from an investigation conducted pursuant to this article that is deemed necessary to serve the interests of the state.

(d) This section does not limit any authority conferred upon the Attorney General or any other department or agency of government to investigate any matter.

Necessity for the Laws Protecting Whistleblower Information from Disclosure

State and local law requires confidentiality in whistleblower programs for good reason. We know from experience that City employees and employees of City contractors are often reluctant to report misconduct or to fully cooperate with whistleblower investigations. Any suspicion that whistleblower staff will not zealously protect their identity or keep confidential the information they report will reduce or eliminate the flow of information. Whistleblower programs cannot be effective unless those with inside knowledge are willing to step forward. Even with assurances of confidentiality, people are reluctant to come forward.

Even the possibility, or perception, of public disclosure would render the Controller's Whistleblower Programs ineffective. The general public often does not understand the nuanced response to a public records request. They see the headlines or summary descriptions in news articles. Even if staff were to release only part of its records -- for example, records publicly available from other City agencies -- the damage will have been done. People will fear that the release of information in one case might mean the release of information that they provide to investigators.

Laws creating such programs are carefully drafted to protect whistleblower records from disclosure. As we have shown above, the State has considered the appropriate balance between the public interest in disclosure and the harm to the public if whistleblower staff cannot assure informants that their identity and the information that they provide will be confidential. The State Legislature has determined that confidentiality is essential, authorizing the State whistleblower program to withhold records of investigations from the public. The voters of San Francisco, in approving the Charter provisions creating the Controller's Whistleblower Program, and the Board of Supervisors, in adopting the implementing ordinance, have made the same determination.

The withholding of the records by the Controller's Whistleblower Program does not cut off public scrutiny of the grant agreements that are the subject of the complaint in question. Ms. O'Flynn - and any other member of the public - can obtain many of the records that have been sought from the Whistleblower Program from other City agencies, including copies of grant agreements and financial records. Further, Ms. O'Flynn, and other concerned citizens, can ask other public officials to review allegations of misconduct.

But whistleblower investigative records are not subject to disclosure under the laws set forth above. Nor may the Task Force rely on provisions of the Sunshine Ordinance to order disclosure. Because the charter of a municipality is its constitution, an ordinance may not change or limit the effect of the charter. *City and County of San Francisco v. Patterson*, 202 Cal.App.3d 95, 102 (1988).

For these reasons, the Task Force should decline to exercise jurisdiction in this matter because it lacks the power to order the disclosure of whistleblower records in violation of the Charter. If the Task Force elects to exercise jurisdiction, it should dismiss the complaint on its merits.



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 CONTROLLER / WHISTLE BLOWER

Name of individual contacted at Department or Commission RANDOLPH MORRIS

- Alleged violation public records access
- Alleged violation of public meeting. Date of meeting _____

Sunshine Ordinance Section 67.24, 67.26, 67.27
(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.

SEE ATTACHED

- FAILURE TO PROVIDE RECORDS REGARDING A

CLOSED CASE

- NO CONFIDENTIALITY ISSUES INVOLVED

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)¹

Name RITA O'FLYNN Address 1756 UNION ST, S.F. 94122

Telephone No. 415-260-7608 E-Mail Address rita-august@msn.com

Date 26 OCT 2010 R. O'Flynn
Signature

I request confidentiality of my personal information. 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).

- RE: Sunshine Ordinance Request for Immediate Disclosure RE:
Complaint #3026 Tenderloin Housing Clinic Financial Deficiencies

Rita August O'Flynn
To whistleblower@sfgov.org, wwaesq@hotmail.com
From: **Rita August O'Flynn** (rita_august@msn.com)
Sent: Fri 9/17/10 10:00 AM
To: whistleblower@sfgov.org
Bcc: wwaesq@hotmail.com

As I, the complainant, have waived my rights to confidentiality, please refer me to the specific San Francisco Administrative Law Code that exempts the Whistleblower program from the Sunshine Ordinance.

Rita O'Flynn 415-386-8224 Cell: 415-260-7608

From: whistleblower@sfgov.org
To: rita_august@msn.com
CC: whistleblower@sfgov.org
Subject: RE: Sunshine Ordinance Request for Immediate Disclosure RE:
Complaint #3026 Tenderloin Housing Clinic Financial Deficiencies
Date: Fri, 17 Sep 2010 08:45:23 -0700

Good Morning,

As stated in the phone conversation on 9/8/2010 and the email sent on 9/9/2010, the Whistleblower Program is not subject to the Sunshine Ordinance requests for documents.

The Whistleblower program will not provide any documentation related to complaint #3026 due to the confidential status and nature of the program.

Randolph Minnis
Whistleblower Complaints Unit
Controller's Office
City and County of San Francisco

Confidentiality notice: the information in this email contains confidential whistleblower information. If you received this email inadvertently, please permanently delete it.

Rita August O'Flynn
<rita_august@msn.com>
09/16/2010 03:58 PM

To <whistleblower@sfgov.org>,
<cityattorney@sfgov.org>
cc <home@prosf.org>,
<auweia1@gmail.com>,
<hotline@hudoig.gov>,
<board.of.supervisors@sfgov.org>,
<soft@sfgov.org>

Subject RE: Sunshine Ordinance Request for
Immediate Disclosure RE: Complaint
#3026 Tenderloin Housing Clinic
Financial Deficiencies

A response is required under the Sunshine Ordinance and is now overdue.

Rita O'Flynn 415-386-8224 Cell: 415-260-7608

From: rita_august@msn.com
To: whistleblower@sfgov.org; cityattorney@sfgov.org
CC: home@prosf.org; auweia1@gmail.com; hotline@hudoig.gov;
board.of.supervisors@sfgov.org; soft@sfgov.org
Subject: RE: Sunshine Ordinance Request for Immediate Disclosure RE:
Complaint #3026 Tenderloin Housing Clinic Financial Deficiencies
Date: Wed, 15 Sep 2010 10:11:27 -0700

Please confirm that the requested documents are available for pickup.

With Kind Regards,

Rita O'Flynn 415-386-8224 Cell: 415-260-7608

From: rita_august@msn.com
To: whistleblower@sfgov.org; cityattorney@sfgov.org
CC: home@prosf.org; auweia1@gmail.com; hotline@hudoig.gov;
board.of.supervisors@sfgov.org; soft@sfgov.org
Subject: RE: Sunshine Ordinance Request for Immediate Disclosure RE:

Complaint #3026

Date: Thu, 9 Sep 2010 19:49:16 -0700

In further support of the release of the requested records to me under the Sunshine Ordinance please see the following:

67.24

(g) Neither the City nor any office, employee, or agent thereof may assert California Public Records Act Section 6255 or any similar provision as the basis for withholding any documents or information requested under this ordinance.

(h) Neither the City nor any office, employee, or agent thereof may assert an exemption for withholding for any document or information based on a "deliberative process" exemption, either as provided by California Public Records Act Section 6255 or any other provision of law that does not prohibit disclosure.

(i) Neither the City, nor any office, employee, or agent thereof, may assert an exemption for withholding for any document or information based on a finding or showing that the public interest in withholding the information outweighs the public interest in disclosure. All withholdings of documents or information must be based on an express provision of this ordinance providing for withholding of the specific type of information in question or on an express and specific exemption provided by California Public Records Act that is not forbidden by this ordinance.

Also, Law Enforcement exemption does not apply because the Controller's Office is not a Penal agency and the Charter provision providing for exempt controller files is a violation of state CPRA law.

Rita O'Flynn 415-386-8224 Cell: 415-260-7608

From: rita_august@msn.com

To: whistleblower@sfgov.org; cityattorney@sfgov.org

CC: home@prosf.org; auwela1@gmail.com; hotline@hudoig.gov;
board.of.supervisors@sfgov.org; soft@sfgov.org

Subject: RE: Sunshine Ordinance Request for Immediate Disclosure RE:
Complaint #3026

Date: Thu, 9 Sep 2010 14:56:09 -0700

I am a citizen of San Francisco, not an employee, and my request for investigation was disclosed by me to other parties, both governmental and non-governmental at the time of my request. As the complainant, I have not and am not requesting confidentiality regarding my identity or the nature and details of my claims. With this e-mail I waive all rights of non-disclosure. Evidence code and any privilege claimed thereunder is not applicable here as the matter has been closed by your department and there is no ongoing investigation or pending litigation. The public's interests in the potential financial mismanagment and non-

compliance of the politically influential non-for-profit, Tenderloin Housing Clinic, with its \$100 million dollars in City contracts and the public's interest in how requests for investigation are managed by the City clearly outweighs my need for confidentiality, which is waived.

Please provide the materials as requested under the Sunshine Ordinance within the next 3 business days.

With Kind Regards,

From: whistleblower@sfgov.org

> Subject: Re: Sunshine Ordinance Request for Immediate Disclosure RE: Complaint #3026

> To: rita_august@msn.com

> Date: Thu, 9 Sep 2010 14:12:31 -0700

>

> Ms. O'Flynn,

>

> Per our phone conversation, charter section F1.110(b) makes confidential
> all drafts, notes, audits, reports and investigations of the Controller.
> Complaints that are currently under investigation are confidential under
> this provision and will not be disclosed. See, also, Campaign and
> Government Conduct Code §4.120. The following grounds for disclosure apply
> to all complaints, whether currently under investigation or whether the
> investigation is closed.

>

> Please also see Government Code section 6254(k), which states the Public
> Records Act allows an agency to decline to disclose "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." (Government Code Section 6254(k).) Evidence Code section 1040
> establishes the official information privilege. Official information means
> "information acquired in confidence by a public employee in the course of
> his or her duty and not open, or officially disclosed, to the public prior
> to the time the claim of privilege is made." (Evid. Code §1040.) A public
> entity has a privilege to refuse to disclose official information if the
> privilege is claimed by a person authorized by the public entity to do so
> and disclosure of the information is against the public interest because
> there is a necessity for preserving the confidentiality of the information
> that outweighs the necessity for disclosure in the interest of justice. (
> Ibid.)

>

> The Charter authorizes the Controller's Office, as City Services Auditor,
> to accept and investigate complaints. (Charter § F.100.) The Controller

- > is also authorized to receive complaints under the whistleblower program
- > set forth in Section 4.105 of the Campaign and Governmental Conduct Code.
- > The Charter and Section 4.120 of the Campaign and Governmental Conduct Code
- > compel the Controller to protect the confidentiality of the identity of the
- > complainant. Therefore, the Controller is authorized to invoke the official
- > information privilege.
- >
- > The complaints are official information. The Controller's Office acquired
- > them in confidence; they have not been disclosed to the public. As noted
- > above, both Appendix F of the Charter and the City's Whistleblower Program
- > in Campaign and Governmental Conduct Code sections 4.100 – 4.135 offer
- > confidentiality to complainants, complaints and investigations interest
- > because there is a necessity for preserving the confidentiality of the
- > information that outweighs the necessity for disclosure in the interest of
- > justice. (Ibid.)
- >
- > Finally, disclosure of the complaints is against the public's interest. As
- > noted above, there is a strong public interest in encouraging employees or
- > members of the public to come forward with complaints of improper
- > governmental conduct. (See Campaign and Governmental Conduct Code
- > §4.100
- > ["The City and County of San Francisco has a paramount interest in
- > protecting the integrity of its governmental institutions. To further this
- > interest, individuals should be encouraged to report to the City's Ethics
- > Commission, Controller, District Attorney, City Attorney and the
- > complainant's department possible violations of laws, regulations and rules
- > governing the conduct of City officers and employees."])
- >
- > The voters have also declared the need to protect the identity of
- > complainants and to protect complainants from retaliation. (Charter
- > §F1.107(c).) If the Controller cannot protect the identity of
- > complainants, whistleblowers will not come forward. As noted above, public
- > disclosure of the complaints will in most instances effectively disclose
- > the identity of the complainant, even if the name of the complainant is
- > removed. Therefore, non-disclosure of the complaints is necessary in most
- > instances to protect the identity of the complainants.
- >
- > Even where disclosure of a complaint may not, under the circumstances of a
- > specific case, result in the disclosure of the identity of the complainant,
- > disclosure of the complaint would undermine the Whistleblower Program. If
- > potential complainants were to learn that this office disclosed complaints,
- > they would operate under the misguided impression that their complaint
- > might be disclosed despite assurances to the contrary. Potential
- > complainants would be unlikely to understand that disclosure was based on
- > fine distinctions made after reviewing the details and individual

- > circumstances of each complaint. As a result, they would refrain from
- > making whistleblower reports, fearing that theirs might also be disclosed.
- >
- > For these reasons, the records in question are protected from disclosure
- > under Government Code section 6254(k) because disclosure would in many
- > instances reveal the identity of complainants and, even as to complaints
- > that would not disclose this information, undermine the purposes of the
- > Whistleblower Program.
- >
- > Thank you,
- >
- > Randolph Minnis
- > 554-4920
- > Whistleblower Complaints Unit
- > Controller's Office
- > City and County of San Francisco
- >
- > Confidentiality notice: the information in this email contains confidential
- > whistleblower information. If you received this email inadvertently,
- > please permanently delete it.
- >

Rita O'Flynn 415-386-8224 Cell: 415-260-7608

From: rita_august@msn.com
To: whistleblower@sfgov.org; cityattorney@sfgov.org
CC: home@prosf.org; auweia1@gmail.com; hotline@hudoig.gov;
board.of.supervisors@sfgov.org
Subject: RE: Sunshine Ordinance Request for Immediate Disclosure RE:
Complaint #3026
Date: Thu, 9 Sep 2010 13:53:59 -0700

- To further clarify my request in the e-mail below, please provide the following:
- each of the documents relied on in making your determination as to each one of my claims
 - the written analysis which formed the basis of your determination in regard to each of my claims.

My claims were (and are) as follows:

- a. *Failure to Fully Disclose Assets*: In both of the audited financial reports,

the auditors indicate that during the fiscal year ending June 30, 2008, the TENDERLOIN HOUSING CLINIC received a donation of real property (900 Innes, San Francisco) that has not be recorded on the financial statements. In the opinion of the auditors, Daoro Zydell & Holland, "accounting principles generally accepted (GAAP) in the United States of America require that such donated property be recorded at fair value.

i. In both of these reports, the auditors indicate that the value of donated property was assessed at \$20,000,000.

ii. In both of these reports, the amount listed for total assets **does not include the \$20,000,000** in real property, thus potentially under reporting the total assets of the TENDERLOIN HOUSING CLINIC by over 60% when seeking funding from the City..

b. **Non-Compliance with Federal Reporting Requirements for Federal Grant Recipients:** In both of the audited financial reports disclosed instances of ongoing non-compliance with US Offices of Management and Budget (OMB) Circular A-133 Compliance Supplement that are applicable to each of the TENDERLOIN HOUSING CLINIC's major federal programs, many of which are funneled to the TENDERLOIN HOUSING CLINIC via the City and County of San Francisco. Thus, there is a liability to the City and County of San Francisco in terms of loss of federal funding due to non-compliance on the part of the TENDERLOIN HOUSING CLINIC.

c. **Control and Significant Deficiencies in Internal Controls over Financial Reporting:** A control deficiency is exists when the design or operation of a control **does not allow management or employees, in the normal course of performing their assigned functions, to prevent or detect non-compliance with a type of compliance requirement of a federal program on a timely basis.** A significant deficiency is a control deficiency, or combination of control deficiencies, that **adversely affect the entity's ability to administer a federal program such that there is more than a remote likelihood that non-compliance with a type of compliance requirement of a federal program that is more than inconsequential will not be prevented or detected by the entity's internal control.**

i. **Significant Deficiency Noted for the Modified Payment Program (MPP) Bank Reconciliation:** In both of the audited financial reports, the auditors indicate that the TENDERLOIN HOUSING CLINIC is not able to prepare a complete and accurate bank reconciliation for its MPP bank account. Specifically, **the TENDERLOIN HOUSING CLINIC is not able to generate a detailed list of funds within individual client accounts that make up the balances in the MMP bank and corresponding MMP liability accounts.** The TENDERLOIN HOUSING CLINIC admits that this has been an ongoing problem since 2006 for which they have received additional funding from the City and County of San Francisco to address, but, as of the fiscal year ending June 30, 2009 this remains a significant deficiency.

ii. **Significant Deficiency Noted for**

Rent Rolls and Property Management: In both of the audited financial reports, the auditors indicated that the TENDERLOIN HOUSING CLINIC does not prepare "rent rolls" as the term is defined by the industry, for any of its master lease hotel properties or the Galvin Apartments (which is wholly owned by the TENDERLOIN HOUSING CLINIC and for which the TENDERLOIN HOUSING CLINIC realized over \$5,000,000 in rents). Without a rent roll, the TENDERLOIN HOUSING CLINIC is unable to readily determine its tenant rents receivable at specific internals, tie to bad debts to specific units, or to easily track vacant units. The TENDERLOIN HOUSING CLINIC admits it has been aware of this problem since 1999; as of the fiscal year ending June 30, 2009 this remains a significant deficiency.

d. **HUD Grants:** According to the independent auditors, the significant deficiencies noted for MMP and Rent Rolls and Property Management also applies to HUD Grants: CFDA#14.218 and CFDA# 4.238.

e. **Recording of Real Property with the City and County of San Francisco:**

i. According the audited reports, in 1995, the TENDERLOIN HOUSING CLINIC purchased 50% ownership interest in 126 Hyde Street, San Francisco, however the TENDERLOIN HOUSING CLINIC's ownership was not officially entered into the title records until January 14, 2009 at which time the TENDERLOIN HOUSING CLINIC recorded the value at its original 1995 cost of \$163,500.00. For the fiscal year ending June 30, 2009 the TENDERLOIN HOUSING CLINIC has reclassified 126 Hyde Street as an asset but at its 1995 value. The TENDERLOIN HOUSING CLINIC "rents" most of this building for its office space and includes some or all of this rent as an expense in budgets presented to the City and County of San Francisco as part of grant award contracts.

ii. As noted above, the transfer of 900 Innes was not recorded in a timely fashion with the City and County of San Francisco and the value recorded is in conflict with the assessed value stated in the auditing reports.

Additionally, I would like to receive any and all documentation of the City Attorney's opinion, legal or otherwise, of "no violation".

Thank You,

Rita O'Flynn 415-386-8224 Cell: 415-260-7608

From: rita_august@msn.com
To: whistleblower@sfgov.org; cityattorney@sfgov.org
CC: home@prosf.org; auwela1@gmail.com

Subject: Sunshine Ordinance Request for Immediate Disclosure RE: Complaint #3026

Date: Thu, 9 Sep 2010 11:03:38 -0700

Please provide all materials/documents related to this matter, including but not limited to letters, e-mail, meeting notes, phone reports, etc.

With Kind Regards,

Rita O'Flynn 415-386-8224 Cell: 415-260-7608

> From: whistleblower@sfgov.org

> Subject: Complaint #3026

> To: rita_august@msn.com

> Date: Wed, 8 Sep 2010 16:02:27 -0700

>

>

> Dear Ms. O'Flynn:

>

> This letter is in reference to your complaint received by the Office of the
> Controller (Controller) on April 26, 2010, alleging significant
> deficiencies in the Tenderloin Housing Clinic's (THC) internal controls
> over financial reporting. In addition, your complaint alleged that the THC
> is noncompliant with several provisions of their grant agreements with the
> City and County of San Francisco (City).

>

> The Whistleblower Program reviewed the allegations brought forth in your
> April 26 email. We interviewed employees from the Human Services Agency
> and
> City Attorney's Office regarding these allegations. The Whistleblower
> Program reviewed THC's grant agreements with the City, THC's 2007, 2008,
> and 2009 Consolidated Financial Statements and Independent Auditors'
> Reports, and Standard Joint Fiscal & Compliance Monitoring reports issued
> in April 2008 and February 2010.

>

> After reviewing the above materials and speaking with the above-mentioned
> parties, we found no violation and closed your complaint. An audit of THC
> is not included in the Controller's Work Plan for the 2011 fiscal year.
> Please note that the closure of this case does not affect your right to
> file a complaint in the future.

>

> If you have any questions, please contact me at (415) 554-5393. Please
> reference the complaint number cited above in all future correspondence or
> contact with this office.

- >
- > Sincerely,
- >
- >
- > Tonia Lediju
- > Director of Audits
- > City Services Auditor
- > Office of the Controller
- >
- >
- > Attachment: (See attached file: 3026 Response.PDF)
- >
- > Confidentiality notice: the information in this email contains confidential
- > whistleblower information. If you received this email inadvertently,
- > please permanently delete it.

Tonia Lediju/CON/SFGOV
11/09/2010 03:53 PM

To sotf@sfgov.org
cc Randolph Minnis/CON/SFGOV@SFGOV
bcc
Subject CLM 10057

Complaint Committee
c/o Chris Rustom, Clerk
Sunshine Ordinance Task Force
1 Dr. Carlton B. Goodlett Place
City Hall, Room 244
San Francisco, CA 94102-4689

Re: Complaint #10057 Rita O' Flynn vs. the Office of the Controller

Dear Members of the Complaint Committee:

The Complaint Committee should dismiss the complaint because the Sunshine Ordinance Task Force has no jurisdiction to order disclosure of the records in question.

The San Francisco Charter created the Controller's Whistleblower Program. San Francisco Charter Section F1.107. The Charter protects the confidentiality of Whistleblower investigations. See Charter Section F1.110:

- (a) The Controller shall have timely access to all records and documents the Controller deems necessary to complete the inquiries and reviews required by this Appendix....
- (b) Notwithstanding any provision of this Charter, or any ordinance or regulation of the City and County of San Francisco, and except to the extent required by state or federal law, all drafts, notes, preliminary reports of Controller's benchmark studies, audits, investigations and other reports shall be confidential. [Emphasis added]

The Board of Supervisors adopted an ordinance governing the Controller's Whistleblower Program. The ordinance requires the Controller's Office to keep confidential all records relating to the program, unless (1) as to the identity of the whistleblower, that person consents to release of the information or (2) release is needed for disciplinary, remedial or enforcement purposes. See Campaign and Government Code Section 4.123:

(a) WHISTLEBLOWER IDENTITY AND INVESTIGATIONS. Every officer and employee of the City shall keep confidential: Controller

(i) The identity of any person who makes a complaint to the Whistleblower Program under Section 4.107 of this Chapter, and any information that would lead to the disclosure of the person's identity, unless the person who made the complaint provides written authorization for the disclosure.

(ii) Complaints or reports to the Whistleblower Program and information related to the investigation of the matter, including drafts, notes, preliminary reports, working papers, records of interviews, communications with complainants and witnesses, and any other materials and information gathered or prepared in the course of the investigation.

The protection of confidentiality set forth in this Section applies irrespective of whether the information was provided in writing and whether the information was provided or is maintained in electronic, digital, paper or any other form or medium.

(b) **INQUIRY REGARDING IDENTITY PROHIBITED.** In order to assure effective implementation of the provisions of this Section providing confidentiality to whistleblowers, City officers and employees may not use any City resources, including work time, to ascertain or attempt to ascertain directly or indirectly the identity of any person who has made a complaint to the Whistleblower Program, unless such person has provided written authorization for the disclosure. Nothing in this Section shall preclude an officer or employee assigned to investigate a complaint under this Chapter from ascertaining the identity of a complainant to the extent necessary to conduct the investigation.

(c) **EXCEPTIONS.** Nothing in this Section shall preclude the Controller from (i) disclosing the identity of a person or other information to the extent necessary to conduct a civil or criminal investigation or to take any enforcement action, including any action to discipline an employee or take remedial action against a contractor, or (ii) releasing information as part of a referral when referring any matter to another City department, commission, board, officer or employee, or to other governmental agencies, for investigation and possible disciplinary, enforcement or remedial action, or (iii) releasing information to the Citizens Audit Review Board so that it may carry out its duty to provide advisory input to the Controller on the Whistleblower Program, provided that information is prepared so as to protect the confidentiality of persons making complaints and of investigations, or (iv) releasing information to inform the public of the nature of the actions taken by the Controller in the operation of the Whistleblower Program provided that information is prepared so as to protect the confidentiality of persons making complaints and of investigations.

It is vital to protect the confidentiality of whistleblower investigations and all records relating to them. To allow disclosure of any investigative material would undermine the Programs efforts to assure City employees, contractors, and the general public, that they may provide information and cooperate with investigations knowing the Program will not disclose their actions or information provided to the Program.

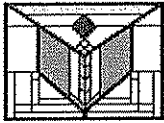
The State of California provides the same protections for its Whistleblower Program. See California Government Code 8547.6, (“ no information obtained from the State Auditor by any department, agency or employee as a result of the Auditors request for assistance nor any information obtained thereafter as a result of further investigation shall be divulged to any person without prior approval of the Auditor”). These statutory protections provided by the State underscore the well-recognized need to protect whistleblower investigatory information. Without these protections, the Whistleblower Program cannot be effective.

The protections provided by the San Francisco Charter do not permit disclosure of records that the complainant seeks. The Complaint Committee should dismiss the complaint for lack of jurisdiction because the Task Force has no authority to order disclosure of confidential records.

Respectfully;

Tonia Lediju
Director of Audits
City Services Auditor
415-554-5393

Tonia Lediju
Audit Director
Office of the Controller, City Services Auditor
City & County of San Francisco
TEL: (415) 554-5393
FAX: (415) 554-7664
<http://www.sfgov.org/controller/csa>



whistleblower/CON/SFGOV

Sent by: Randolph
Minnis/CON/SFGOV

11/09/2010 03:59 PM

To SOTF/SOTF/SFGOV@SFGOV

cc whistleblower/CON/SFGOV@SFGOV

bcc

Subject Re: Complaint #10057

Complaint Committee
c/o Chris Rustom, Clerk
Sunshine Ordinance Task Force
1 Dr. Carlton B. Goodlett Place
City Hall, Room 244
San Francisco, CA 94102-4689

Re: Complaint #10057 Rita O' Flynn vs. the Office of the Controller

Dear Members of the Complaint Committee:

The Complaint Committee should dismiss the complaint because the Sunshine Ordinance Task Force has no jurisdiction to order disclosure of the records in question.

The San Francisco Charter created the Controller's Whistleblower Program. San Francisco Charter Section F1.107. The Charter protects the confidentiality of Whistleblower investigations. See Charter Section F1.110:

- (a) The Controller shall have timely access to all records and documents the Controller deems necessary to complete the inquiries and reviews required by this Appendix....
- (b) Notwithstanding any provision of this Charter, or any ordinance or regulation of the City and County of San Francisco, and except to the extent required by state or federal law, all drafts, notes, preliminary reports of Controller's benchmark studies, audits, investigations and other reports shall be confidential. [Emphasis added]

The Board of Supervisors adopted an ordinance governing the Controller's Whistleblower Program. The ordinance requires the Controller's Office to keep confidential all records relating to the program, unless (1) as to the identity of the whistleblower, that person consents to release of the information or (2) release is needed for disciplinary, remedial or enforcement purposes. See Campaign and Government Code Section 4.123:

- (a) WHISTLEBLOWER IDENTITY AND INVESTIGATIONS. Every officer and employee of the City shall keep confidential: Controller
 - (i) The identity of any person who makes a complaint to the Whistleblower Program under Section 4.107 of this Chapter, and any information that would lead to the disclosure of the person's identity, unless the person who made the complaint provides written authorization for the disclosure.
 - (ii) Complaints or reports to the Whistleblower Program and information related to

the investigation of the matter, including drafts, notes, preliminary reports, working papers, records of interviews, communications with complainants and witnesses, and any other materials and information gathered or prepared in the course of the investigation.

The protection of confidentiality set forth in this Section applies irrespective of whether the information was provided in writing and whether the information was provided or is maintained in electronic, digital, paper or any other form or medium.

(b) **INQUIRY REGARDING IDENTITY PROHIBITED.** In order to assure effective implementation of the provisions of this Section providing confidentiality to whistleblowers, City officers and employees may not use any City resources, including work time, to ascertain or attempt to ascertain directly or indirectly the identity of any person who has made a complaint to the Whistleblower Program, unless such person has provided written authorization for the disclosure. Nothing in this Section shall preclude an officer or employee assigned to investigate a complaint under this Chapter from ascertaining the identity of a complainant to the extent necessary to conduct the investigation.

(c) **EXCEPTIONS.** Nothing in this Section shall preclude the Controller from (i) disclosing the identity of a person or other information to the extent necessary to conduct a civil or criminal investigation or to take any enforcement action, including any action to discipline an employee or take remedial action against a contractor, or (ii) releasing information as part of a referral when referring any matter to another City department, commission, board, officer or employee, or to other governmental agencies, for investigation and possible disciplinary, enforcement or remedial action, or (iii) releasing information to the Citizens Audit Review Board so that it may carry out its duty to provide advisory input to the Controller on the Whistleblower Program, provided that information is prepared so as to protect the confidentiality of persons making complaints and of investigations, or (iv) releasing information to inform the public of the nature of the actions taken by the Controller in the operation of the Whistleblower Program provided that information is prepared so as to protect the confidentiality of persons making complaints and of investigations.

It is vital to protect the confidentiality of whistleblower investigations and all records relating to them. To allow disclosure of any investigative material would undermine the Programs efforts to assure City employees, contractors, and the general public, that they may provide information and cooperate with investigations knowing the Program will not disclose their actions or information provided to the Program.

The State of California provides the same protections for its Whistleblower Program. See California Government Code 8547.6, (“ no information obtained from the State Auditor by any department, agency or employee as a result of the Auditors request for assistance nor any information obtained thereafter as a result of further investigation shall be divulged to any person without prior approval of the Auditor”). These statutory protections provided by the State underscore the well-recognized need to protect whistleblower investigatory information.

Without these protections, the Whistleblower Program cannot be effective.

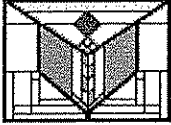
The protections provided by the San Francisco Charter do not permit disclosure of records that the complainant seeks. The Complaint Committee should dismiss the complaint for lack of jurisdiction because the Task Force has no authority to order disclosure of confidential records.

Respectfully;

Tonia Lediju
Director of Audits
City Services Auditor
415-554-5393

Tonia Lediju
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Confidentiality notice: the information in this email contains confidential whistleblower information. If you received this email inadvertently, please permanently delete it.



whistleblower/CON/SFGOV

Sent by: Randolph
Minnis/CON/SFGOV

12/21/2010 03:28 PM

To SOTF/SOTF/SFGOV@SFGOV

cc whistleblower/CON/SFGOV@SFGOV, Tonia
Lediju/CON/SFGOV@SFGOV

bcc

Subject RE: Complaint #10057

This e-mail is to confirm submission to the Sunshine Task Force (SOTF) of the attached response to complaint number #10057.

The Office of the Controller - City Services Auditor (Whistleblower Program) contests the jurisdiction of SOTF in relation to the release of confidential whistleblower work product. The Whistleblower Program also contests the merits on which the complainant has requested confidential whistleblower work product be made public.



The SOTF will find the programs response in the attached document. Hearing Submission.doc

Respectfully;

Tonia Lediju
Director of Audits
City Services Auditor
415-554-5393

Confidentiality notice: the information in this email contains confidential whistleblower information. If you received this email inadvertently, please permanently delete it.

Sunshine Ordinance Task Force
c/o Chris Rustom, Clerk
1 Dr. Carlton B. Goodlett Place
City Hall, Room 244
San Francisco, CA 94102-4689

Re: Complaint #10057 Rita O'Flynn v. Office of the Controller

Dear Members of the Sunshine Ordinance Task Force:

The complaint in this matter concerns Ms. O'Flynn's request to the Controller for all records involving a whistleblower investigation. The Controller's Whistleblower Program operates pursuant to a Charter amendment approved by the voters in 2003.

To be effective, whistleblower programs must keep information confidential. If whistleblower programs did not zealously maintain confidentiality, those with incriminating or other damaging information would not come forward to report wrongdoing or cooperate with the investigation of alleged misconduct. Information from whistleblower investigations may only be disclosed if the investigation results in a finding of misconduct, and then may be disclosed only for the purpose of disciplinary or remedial action.

When the voters approved the Charter amendment requiring the Controller to establish a whistleblower program, they made records relating to investigations confidential. Like San Francisco, other public entities keep records of whistleblower investigations confidential.

We now set forth the provisions of the Charter and implementing local law that apply to the records at issue in this matter. In declining to provide whistleblower records to the complainant, the Controller's Office acted in compliance with these laws. The Task Force should decline to take jurisdiction over the complaint because the Task Force, like the Controller's Office, is subject to these laws. If the Task Force nonetheless elects to exercise jurisdiction, it should dismiss the complaint.

San Francisco Charter Section F1.110 and Implementing Local Law Make Whistleblower Records Confidential

The San Francisco Charter requires the Controller to operate a whistleblower program and to maintain the confidentiality of whistleblower investigations.

San Francisco Charter section F1.107(c). Notwithstanding any provision of this Charter, including, but not limited to Section C3.699-11, or any ordinance or regulation of the City and County of San Francisco, the Controller shall administer a whistleblower and citizen complaint hotline telephone number and website and publicize the hotline and website through press releases, public advertising, and communications to City employees. [Underlining added.]

San Francisco Charter Section F1.110. (a) The Controller shall have timely access to all records and documents the Controller deems necessary to complete the inquiries and reviews required by this Appendix. If a City officer, employee, agency, department, commission, or agency does not comply with the Controller's request for such records and documents, the Controller may issue a subpoena. The provisions of this subdivision shall not apply to those records and documents of City agencies for which a claim of privilege has been properly and appropriately raised, or which are prepared or maintained by the City Attorney, the District Attorney, or the Ethics Commission for use in any investigation authorized by federal, state law or local law.

(b) Notwithstanding any other provision of this Charter, or any ordinance or regulation of the City and County of San Francisco, and except to the extent required by state or federal law, all drafts, notes, preliminary reports of Controller's benchmark studies, audits, investigations and other reports shall be confidential. [Underlining added.]

In 2008, the Board of Supervisors adopted an ordinance governing the Controller's Whistleblower Program. Campaign and Governmental Conduct Code Section 4.123 provides as follows :

**CONFIDENTIALITY PROTECTION FOR WHISTLEBLOWER PROGRAM
COMPLAINANTS AND INVESTIGATIONS.**

(a) WHISTLEBLOWER IDENTITY AND INVESTIGATIONS. Every officer and employee of the City shall keep confidential:

(i) The identity of any person who makes a complaint to the Whistleblower Program under Section 4.107 of this Chapter, and any information that would lead to the disclosure of the person's identity, unless the person who made the complaint provides written authorization for the disclosure.

(ii) Complaints or reports to the Whistleblower Program and information related to the investigation of the matter, including drafts, notes, preliminary reports, working papers, records of interviews, communications with complainants and witnesses, and any other materials and information gathered or prepared in the course of the investigation.

The protection of confidentiality set forth in this Section applies irrespective of whether the information was provided in writing and whether the information was provided or is maintained in electronic, digital, paper or any other form or medium.

(b) **INQUIRY REGARDING IDENTITY PROHIBITED.** In order to assure effective implementation of the provisions of this Section providing confidentiality to whistleblowers, City officers and employees may not use any City resources, including work time, to ascertain or attempt to ascertain directly or indirectly the identity of any person who has made a complaint to the Whistleblower Program, unless such person has provided written authorization for the disclosure. Nothing in this Section shall preclude an officer or employee assigned to investigate a complaint under this Chapter from ascertaining the identity of a complainant to the extent necessary to conduct the investigation.

(c) **EXCEPTIONS.** Nothing in this Section shall preclude the Controller from (i) disclosing the identity of a person or other information to the extent necessary to conduct a civil or criminal investigation or to take any enforcement action, including any action to discipline an employee or take remedial action against a contractor, or (ii) releasing information as part of a referral when referring any matter to another City department, commission, board, officer or employee, or to other governmental agencies, for investigation and possible disciplinary, enforcement or remedial action, or (iii) releasing information to the Citizens Audit Review Board so that it may carry out its duty to provide advisory input to the Controller on the Whistleblower Program, provided that information is prepared so as to protect the confidentiality of persons making complaints and of investigations, or (iv) releasing information to inform the public of the nature of the actions taken by the Controller in the operation of the Whistleblower Program

provided that information is prepared so as to protect the confidentiality of persons making complaints and of investigations. [Underlining added.]

State Law Makes Records of the State's Whistleblower Program Confidential

San Francisco is not alone in adopting strong confidentiality protections for whistleblower programs. The California Legislature has authorized a whistleblower program, making the State Auditor responsible for implementing the program. Cal. Gov. Code § 8547.4. When it created the State's whistleblower program, the Legislature adopted findings to support the need for confidentiality:

Government Code Section 8547.1. Legislative findings and declarations.

The Legislature finds and declares that state employees should be free to report waste, fraud, abuse of authority, violation of law, or threat to public health without fear of retribution. The Legislature further finds and declares that public servants best serve the citizenry when they can be candid and honest without reservation in conducting the people's business.

The State's whistleblower program – like San Francisco's – limits the public's access to records of whistleblower investigations. As the following provisions show, the governing statutes narrowly circumscribes who may release information and for what purpose:

Government Code Section 8547.6. Assistance in conducting investigation; confidential information.

The State Auditor may request the assistance of any state department, agency, or employee in conducting any investigation required by this article. If an investigation conducted by the State Auditor involves access to confidential academic peer review records of University of California academic personnel, these records shall be provided in a form consistent with university policy effective on August 1, 1992. No information obtained from the State Auditor by any department, agency, or employee as a result of the State Auditor's request for assistance, nor any information obtained thereafter as a result of further investigation, shall be divulged or made known to any person without the prior approval of the State Auditor.

Government Code Section 8547.7. Report of improper governmental activities; enforcement authority.

(a) If the State Auditor determines that there is reasonable cause to believe that an employee or state agency has engaged in any improper governmental activity, he or she shall report the nature and details of the activity to the head of the employing agency, or the appropriate appointing authority, and may include recommended actions to prevent the continuation or recurrence of the activity. If appropriate, the State Auditor shall report this information to the Attorney General, the policy committees of the Senate and Assembly having jurisdiction over the subject involved, and to any other authority that the State Auditor determines appropriate.

(b) The State Auditor shall not have any enforcement power. In any case in which the State Auditor submits a report of alleged improper activity to the head of the employing agency or appropriate appointing authority, that individual shall report to the State Auditor with respect to any action taken by the individual regarding the activity, the first report being transmitted no later than 60 days after the date of the State Auditor's report and monthly thereafter until final action has been taken.

(c) The State Auditor shall keep confidential every investigation, including, but not limited to, all investigative files and work product, except that the State Auditor may issue any report of an investigation that has been substantiated, keeping confidential the

identity of the individual or individuals involved, or, subject to the limitations of Section 8547.5, release any findings or evidence supporting any findings resulting from an investigation conducted pursuant to this article that is deemed necessary to serve the interests of the state.

(d) This section does not limit any authority conferred upon the Attorney General or any other department or agency of government to investigate any matter.

Necessity for the Laws Protecting Whistleblower Information from Disclosure

State and local law requires confidentiality in whistleblower programs for good reason. We know from experience that City employees and employees of City contractors are often reluctant to report misconduct or to fully cooperate with whistleblower investigations. Any suspicion that whistleblower staff will not zealously protect their identity or keep confidential the information they report will reduce or eliminate the flow of information. Whistleblower programs cannot be effective unless those with inside knowledge are willing to step forward. Even with assurances of confidentiality, people are reluctant to come forward.

Even the possibility, or perception, of public disclosure would render the Controller's Whistleblower Programs ineffective. The general public often does not understand the nuanced response to a public records request. They see the headlines or summary descriptions in news articles. Even if staff were to release only part of its records -- for example, records publicly available from other City agencies -- the damage will have been done. People will fear that the release of information in one case might mean the release of information that they provide to investigators.

Laws creating such programs are carefully drafted to protect whistleblower records from disclosure. As we have shown above, the State has considered the appropriate balance between the public interest in disclosure and the harm to the public if whistleblower staff cannot assure informants that their identity and the information that they provide will be confidential. The State Legislature has determined that confidentiality is essential, authorizing the State whistleblower program to withhold records of investigations from the public. The voters of San Francisco, in approving the Charter provisions creating the Controller's Whistleblower Program, and the Board of Supervisors, in adopting the implementing ordinance, have made the same determination.

The withholding of the records by the Controller's Whistleblower Program does not cut off public scrutiny of the grant agreements that are the subject of the complaint in question. Ms. O'Flynn - and any other member of the public - can obtain many of the records that have been sought from the Whistleblower Program from other City agencies, including copies of grant agreements and financial records. Further, Ms. O'Flynn, and other concerned citizens, can ask other public officials to review allegations of misconduct.

But whistleblower investigative records are not subject to disclosure under the laws set forth above. Nor may the Task Force rely on provisions of the Sunshine Ordinance to order disclosure. Because the charter of a municipality is its constitution, an ordinance may not change or limit the effect of the charter. *City and County of San Francisco v. Patterson*, 202 Cal.App.3d 95, 102 (1988).

For these reasons, the Task Force should decline to exercise jurisdiction in this matter because it lacks the power to order the disclosure of whistleblower records in violation of the Charter. If the Task Force elects to exercise jurisdiction, it should dismiss the complaint on its merits.