

Date: Jan. 20, 2011

Item No. 13 & 14
File No. 10064

SUNSHINE ORDINANCE TASK FORCE

AGENDA PACKET CONTENTS LIST*

- Anonymous Tenants v City Attorney's Office**
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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.



DENNIS J. HERRERA
City Attorney

JERRY THREET
Deputy City Attorney

DIRECT DIAL: (415) 554-3914
E-MAIL: jerry.threet@sfgov.org

MEMORANDUM

December 30, 2010:

ANONYMOUS TENANTS VS. CITY ATTORNEY'S OFFICE (10064)

COMPLAINT

THE COMPLAINANT ALLEGES THE FOLLOWING:

Complainant, Anonymous Tenants, alleges the City Attorney's Office (CAO) has not complied with his October 22, 2010 Immediate Disclosure Request for documents related to the CAO's public advice opinion dated October 6, 2010 to the Board of Appeals.

COMPLAINANT FILES COMPLAINT:

On November 19, 2010, Anonymous Tenants filed a Sunshine Complaint against the CAO for violations of section 67.22(a), 67.24(a)(1), and 67.24(b)(1)(ii) of the Ordinance.

JURISDICTION

The CAO is a charter department of the City; therefore, the Task Force generally has jurisdiction to consider a public records complaint under the Ordinance against it. The CAO has not contested jurisdiction in this matter.

APPLICABLE STATUTORY SECTION(S):

Administrative Code Sections 67.21, 67.22, and 67.24.

APPLICABLE CASE LAW:

See citations in analysis below.

ISSUES TO BE DETERMINED

Uncontested Facts:

On October 22, 2010, Anonymous Tenants made an Immediate Disclosure Request for documents related to the CAO's public advice opinion dated October 6, 2010 to the Board of Appeals. The IDR requested the following documents: 1) the cover memorandum that was submitted with the opinion "describing all the requirements under the heading Review and Approval by the Chief Assistant City Attorney"; and 2) all documents and statements in regard to the reviews by all the parties involved. In addition, the IDR made the following inquiries for

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information: 1) who is the team leader that must review and did review the opinion; 2) who is the Chief Assistant City Attorney; and 3) who are the deputies who reviewed the opinion.

The CAO responded by providing answers to the first two requests for information, but declined to answer the third request for information or to provide any documents responsive to the two document requests. The CAO further justified its refusal to provide these documents or to answer the third request for information by stating that the documents and information sought were protected from disclosure by the attorney work product doctrine. The CAO specifically cited the following statutory bases for its claim of exemption from disclosure: Cal. Gov't Code §§ 6254(k) & 6276.04, and Cal. Code Civ. Proc. § 2018.030. With regard to the third request for information, the CAO also stated that it was an interrogatory, or question seeking information rather than documents, and that neither the Public Records Act nor the Sunshine Ordinance required the CAO to respond to such a request.

QUESTIONS THAT MIGHT ASSIST IN DETERMINING FACTS:

- What further records exist which are responsive to Anonymous Tenants request?
- What is the nature of these records?

LEGAL ISSUES/LEGAL DETERMINATIONS:

- Are documents which constitute attorney work product exempted from disclosure under the PRA and the Ordinance?
- Do the records withheld by the CAO from disclosure constitute attorney work product?
- Does the Ordinance or the PRA require a department to respond to a request for information that is not kept in documentary form?
- If so, do the exemptions from disclosure under the PRA also apply to limit the information a department must provide orally?

SUGGESTED ANALYSIS

The City Attorney's response to this complaint contains a thorough analysis of the issues involved and the statutory justification for withholding records. Included here for the review of the Task Force is a more limited analysis of the exemption from disclosure of records that fall under the attorney work product doctrine.

Attorney Work Product Doctrine

§ 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." Section 6726.04 of the Public Records Act specifically provides that attorney work product documents are exempt from disclosure as public records. That section in turn refers to Code of Civil Procedure Section

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2018.030, which defines attorney work product to mean "[a] writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories[.]"

California courts have applied 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 [public agency may rely on the attorney work product privilege to decline to disclose a document].) The *Axelrad* court further held that 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." (82 Cal.App.4th at p. 833.) Also, courts have expressly recognized that 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; *Popelka, Allard, McCowan & Jones v. Superior Court* (1980) 107 Cal.App.3d 496, 500.)

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 petition, 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

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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 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. 67.22. RELEASE OF ORAL PUBLIC INFORMATION.

Release of oral public information shall be accomplished as follows:

- (a) Every department head shall designate a person or persons knowledgeable about the affairs of the department, to provide information, including oral information, to the public about the department's operations, plans, policies and positions. The department head may designate himself or herself for this assignment, but in any event shall arrange that an alternate be available for this function during the absence of the person assigned primary responsibility. If a department has multiple bureaus or divisions, the department may designate a person or persons for each bureau or division to provide this information.
- (b) The role of the person or persons so designated shall be to provide information on as timely and responsive a basis as possible to those members of the public who are not requesting information from a specific person. This section shall not be interpreted to curtail existing informal contacts between employees and members of the public when these contacts are occasional, acceptable to the employee and the department, not disruptive of his or her operational duties and confined to accurate information not confidential by law.
- (c) No employee shall be required to respond to an inquiry or inquiries from an individual if it would take the employee more than fifteen minutes to obtain the information responsive to the inquiry or inquiries.

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:

(a) Drafts and Memoranda.

- (1) Except as provided in subparagraph (2), no preliminary draft or department memorandum, whether in printed or electronic form, shall be exempt from disclosure under Government Code

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Section 6254, subdivision (a) or any other provision. If such a document is not normally kept on file and would otherwise be disposed of, its factual content is not exempt under subdivision (a). Only the recommendation of the author may, in such circumstances, be withheld as exempt.

(2) Draft versions of an agreement being negotiated by representatives of the City with some other party need not be disclosed immediately upon creation but must be preserved and made available for public review for 10 days prior to the presentation of the agreement for approval by a policy body, unless the body finds that and articulates how the public interest would be unavoidably and substantially harmed by compliance with this 10 day rule, provided that policy body as used in this subdivision does not include committees. In the case of negotiations for a contract, lease or other business agreement in which an agency of the City is offering to provide facilities or services in direct competition with other public or private entities that are not required by law to make their competing proposals public or do not in fact make their proposals public, the policy body may postpone public access to the final draft agreement until it is presented to it for approval.

(b) Litigation Material.

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

(i) A pre-litigation claim against the City;

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

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.

(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.

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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.

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 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.

JJJ. § 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.

§ 6276.04. "AERONAUTICS ACT" TO "AVOCADO HANDLER TRANSACTION RECORDS"

...
Attorney, work product, confidentiality of, Section 6202, Business and Professions Code.

Attorney work product, discovery, Chapter 4 (commencing with Section 2018.010), of Title 4, of Part 4 of the Code of Civil Procedure.



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

[X] 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? [X] yes [] no
Do you also want a pre-hearing conference before the Complaint Committee? [] yes [X] no

(Optional) Name ANONYMOUS TENANTS Address

Telephone No. 415- - E-Mail Address @Yahoo.com

Date 11-16-10 Signature

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

1 NOTICE: PERSONAL INFORMATION THAT YOU PROVIDE MAY BE SUBJECT TO DISCLOSURE UNDER THE CALIFORNIA PUBLIC RECORDS ACT AND THE SUNSHINE ORDINANCE, EXCEPT WHEN CONFIDENTIALITY IS SPECIFICALLY REQUESTED. YOU MAY LIST YOUR BUSINESS/OFFICE ADDRESS, TELEPHONE NUMBER AND E-MAIL ADDRESS IN LIEU OF YOUR HOME ADDRESS OR OTHER PERSONAL CONTACT INFORMATION. Complainants can be anonymous as long as the complainant provides a reliable means of contact with the SOTF (Phone number, fax number, or e-mail address).

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 09:34 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.



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

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@sfgov.org
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

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

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

Sent: Tue, November 2, 2010 10:25:11 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.

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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:

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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,

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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.

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.

.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:

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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>.

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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

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Date: 10/22/2010 08:03 AM
Subject: SUNSHINE REQUEST / IMMEDIATE DISCLOSURE REQUEST

SUNSHINE REQUEST
IMMEDIATE DISCLOSURE REQUEST

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Thank you.



Tenants 769NorthPoint
<tenants769np@yahoo.com>

11/19/2010 09:46 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>
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Cc: Matt Dorsey <Matt.Dorsey@sfgov.org>
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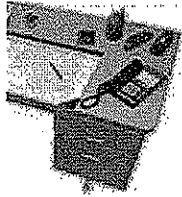
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Thank you.



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?
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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**



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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