

Date: Dec. 14, 2011

Item No. 14
File No. 11034

SUNSHINE ORDINANCE TASK FORCE

AGENDA PACKET CONTENTS LIST*

- Frank McDowell v SFMTA**
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Completed by: Chris Rustom

Date: Dec 9, 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

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MEMORANDUM

TO: Sunshine Task Force
FROM: Jerry Threet
Deputy City Attorney
DATE: September 21, 2011
RE: RECONSIDERATION: *Complaint No. 11034, McDowell v. San Francisco
Municipal Transportation Agency*

PETITION FOR RECONSIDERATION OF COMPLAINT

Facts Related to Reconsideration Petition

Mr. McDowell's original complaint against MTA, for failing to adequately respond to his public records request, further outlined below, was heard on May 24, 2011. The Task Force found that MTA's response was untimely, but Task Force members made no motion to find that MTA had failed to provide responsive documents, as complainant had further alleged.

During the May 24, 2011 hearing, McDowell alleged that MTA had failed to provide him with responsive documents in their possession. Dorian Maxwell presented testimony in support of McDowell, stating that MTA had recently provided Maxwell with records sought by McDowell in his records request, proving that MTA had failed to provide McDowell with responsive records in its possession. David Hill of MTA responded that the documents MTA had provided to Maxwell were individual employee discipline records, not a matrix such as that requested by McDowell, and further stated that there was no matrix of employee discipline related to drive-cam recordings in the possession of MTA.

On May 31, 2011, following the conclusion of the hearing on his complaint, McDowell sent to the Task Force what he said was evidence of MTA's misrepresentations during that hearing. That evidence was a document that appears to be a matrix of disciplinary actions against MTA drivers related to drive-cam recordings, which McDowell alleges had been provided to Maxwell. During the July 14, 2011 hearing of the Education and Outreach Committee on this complaint, McDowell stated that this new evidence demonstrates that the decision of the Task Force was in error due to an absence of crucial evidence and the misrepresentation by MTA that the matrix did not exist. McDowell requested at that time that the complaint be reheard by the Task Force so that the new evidence could be considered.

Procedure Related to Reconsideration Petition

Section E of the Complaint Procedures of the Task Force provides that, "[w]ithin 10 days of receipt issuance of the Order of Determination, either the complainant or respondent may petition the SOTF for a reconsideration only if information exists that was not available at the time of the hearing and the petitioning party must present an offer of proof as to the new information." It further provides that "[t]he Task Force shall consider the petition at its next

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scheduled meeting. If a petition for reconsideration is granted, a new hearing on the complaint shall be scheduled at the next SOTF meeting."

It would appear that McDowell has properly availed himself of this section and has made an offer of proof as to new information that was not available during the original hearing on his complaint. It is now up to the Task Force to decide whether to grant the petition for rehearing. If it does, the original complaint shall be scheduled for a new hearing at the next meeting of the Task Force. If not, this matter remains concluded.

COMPLAINT**THE COMPLAINANT ALLEGES THE FOLLOWING:**

Complainant Frank McDowell ("Complainant") alleges that the Metropolitan Transportation Agency ("MTA") has not adequately responded to his March 16, 2011 public records request for "matrix on all discipline as a result from Drive-cam."

COMPLAINANT FILES COMPLAINT:

On April 19, 2011, Complainant filed this complaint against MTA.

APPLICABLE STATUTORY SECTION(S):

- Section 67.21 governs the process for gaining access to public records.
- Section 67.25 governs the immediacy of response.

APPLICABLE CASE LAW:

None

ISSUES TO BE DETERMINED

Uncontested/Contested Facts: Complainant alleges that on March 16, 2011, he requested from MTA public records, in particular, "any and all documents related to the Drive Cam."

On May 10, 2011, MTA responded to the Sunshine Complaint. In that response, copied to Complainant, MTA noted that staff reviewing Complainant's March 16, 2011 correspondence had overlooked his public records request. MTA noted that Complainant had resubmitted his public records request on April 27, 2011, and that MTA had responded to that request on May 6, 2011, within ten days of this second request. In that May 6, 2011 response to Complainant, MTA informed Complainant that it was providing one document, described as limited to the time period from February 2010-July 2010 and comparing grievance data for DriveCam related discipline to non-DriveCam related discipline. Respondent also informed Complainant that the document did not capture discipline information if no grievance was filed.

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QUESTIONS THAT MIGHT ASSIST IN DETERMINING FACTS:

- Are the records provided to Complainant fully responsive to his request?

LEGAL ISSUES/LEGAL DETERMINATIONS:

- Has MTA timely responded to the request?
- Has MTA fully and completely responded to the request?
- Did staff oversight justify the initial delay in providing the records?
- Are the MTA's justifications for any delay allowed by the Ordinance and the PRA?
- Did respondent violate Section 67.21 of the Ordinance?
- Were sections of the Sunshine Ordinance, Brown Act, and/or California Constitution Article I, Section three violated?

SUGGESTED ANALYSIS

Section 67.21 of the Ordinance provides that 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 a public records request. The questions before the Task Force are: (1) May the failure to provide public records within ten days of an initial request be excused on the grounds that the request was overlooked due to staff error; and (2) Is the failure to respond to a records request within ten days cured by a timely response to a second renewed request?

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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CHAPTER 67, SAN FRANCISCO ADMINISTRATIVE CODE (SUNSHINE ORDINANCE)**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.

SEC. 67.25. IMMEDIACY OF RESPONSE.

(a) Notwithstanding the 10-day period for response to a request permitted in Government Code Section 6256 and in this Article, a written request for information described in any category of non-exempt public information shall be satisfied no later than the close of business on the day following the day of the request. This deadline shall apply only if the words "Immediate Disclosure Request" are placed across the top of the request and on the envelope, subject line, or cover sheet in which the request is transmitted. Maximum deadlines provided in this article are appropriate for more extensive or demanding requests, but shall not be used to delay fulfilling a simple, routine or otherwise readily answerable request.

(b) If the voluminous nature of the information requested, its location in a remote storage facility or the need to consult with another interested department warrants an extension of 10 days as provided in Government Code Section 6456.1, the requester shall be notified as required by the close of business on the business day following the request.

(c) The person seeking the information need not state his or her reason for making the request or the use to which the information will be put, and requesters shall not be routinely asked to make such a disclosure. Where a record being requested contains information most of which is exempt from disclosure under the California Public Records Act and this article, however, the City Attorney or custodian of the record may inform the requester of the nature and extent of the non-exempt information and inquire as to the requester's purpose for seeking it, in order to suggest alternative sources for the information which may involve less redaction or to otherwise prepare a response to the request.

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(d) Notwithstanding any provisions of California Law or this ordinance, in response to a request for information describing any category of non-exempt public information, when so requested, the City and County shall produce any and all responsive public records as soon as reasonably possible on an incremental or "rolling" basis such that responsive records are produced as soon as possible by the end of the same business day that they are reviewed and collected. This section is intended to prohibit the withholding of public records that are responsive to a records request until all potentially responsive documents have been reviewed and collected. Failure to comply with this provision is a violation of this article.

SEC. 67.26. WITHHOLDING KEPT TO A MINIMUM.

No record shall be withheld from disclosure in its entirety unless all information contained in it is exempt from disclosure under express provisions of the California Public Records Act or of some other statute. Information that is exempt from disclosure shall be masked, deleted or otherwise segregated in order that the nonexempt portion of a requested record may be released, and keyed by footnote or other clear reference to the appropriate justification for withholding required by section 67.27 of this article. This work shall be done personally by the attorney or other staff member conducting the exemption review. The work of responding to a public-records request and preparing documents for disclosure shall be considered part of the regular work duties of any city employee, and no fee shall be charged to the requester to cover the personnel costs of responding to a records request.

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.

CAL. PUBLIC RECORDS ACT (GOVT. CODE §§ 6250, ET SEQ.)**SECTION 6253**

- (a) Public records are open to inspection at all times during the office hours of the state or local agency and every person has a right to inspect any public record, except as hereafter provided. Any reasonably segregable portion of a record shall be available for inspection by any person requesting the record after deletion of the portions that are exempted by law.
- (b) Except with respect to public records exempt from disclosure by express provisions of law, each state or local agency, upon a request for a copy of records that reasonably describes an

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identifiable record or records, shall make the records promptly available to any person upon payment of fees covering direct costs of duplication, or a statutory fee if applicable. Upon request, an exact copy shall be provided unless impracticable to do so.

(c) Each agency, upon a request for a copy of records, shall, within 10 days from receipt of the request, determine whether the request, in whole or in part, seeks copies of disclosable public records in the possession of the agency and shall promptly notify the person making the request of the determination and the reasons therefor. In unusual circumstances, the time limit prescribed in this section may be extended by written notice by the head of the agency or his or her designee to the person making the request, setting forth the reasons for the extension and the date on which a determination is expected to be dispatched. No notice shall specify a date that would result in an extension for more than 14 days. When the agency dispatches the determination, and if the agency determines that the request seeks disclosable public records, the agency shall state the estimated date and time when the records will be made available. As used in this section, "unusual circumstances" means the following, but only to the extent reasonably necessary to the proper processing of the particular request:

- (1) The need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request.
- (2) The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records that are demanded in a single request.
- (3) The need for consultation, which shall be conducted with all practicable speed, with another agency having substantial interest in the determination of the request or among two or more components of the agency having substantial subject matter interest therein.
- (4) The need to compile data, to write programming language or a computer program, or to construct a computer report to extract data.

SECTION 6254. EXEMPTION OF PARTICULAR RECORDS

Except as provided in Sections 6254.7 and 6254.13, nothing in this chapter shall be construed to require disclosure of records that are any of the following:

[...]

- (c) Personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy.

FRANK MCDOWELL
1575 DAWNVIEW DIRVE
BRENTWOOD, CA. 94513

NOVEMBER 3, 2011

SFMTA
MR. DAVID HILL

PER MEMORANDUM OF UNDERSTANDING
BETWEEN
SAN FRANCISCO MUNICIPAL TRANSPORTATION
AGENCY AND
TRANSPORT WORKER'S UNION, LOCAL 250-A (9163)
JULY 1, 2011 – JUNE 30, 2014

SECTION 3.5 DATA

THE SFMTA WILL PROVIDE TO THE TRANSPORT WORKERS UNION LOCAL 250-A PUBLIC RECORDS PREPARED BY THE SFMTA OR CONSULTANT WORKING ON THEIR BEHALF CONSISTING OF DATA, CHARTS, GRAPHS, TABLES OR SIMILAR DOCUMENTS ON ALL ISSUES COVERED BY THE MOU, INCLUDING DATA ON DISCIPLINES, ACCIDENTS, CUSTOMER SERVICE COMPLAINTS & SCHEDULES, ANNUAL REPORTS CONCERNING COMPLIANCE WITH FEDERAL AND/ OR STATE DRUG AND ALCOHOL TESTING REQUIREMENT AND QUARTLY AND/ OR ANNUAL REPORTS CONCERNING FEDERAL AND STATE FUNDS. RECEIVED BY SFMTA THE UNION WILL BE PLACED ON THE REGULAR CIRCULATION LIST FOR RECEIVING THOSE TABLES REGULARLY PREPARED AND CIRCULATED BY SFMTA.

SECTION 19.2 RIGHT TO VIEW PHOTO GRAPHS AND VIDEO

BEFORE SFMTA MAKES A DECISION TO SUSPEND OR TERMINATE AN OPERATOR AS A RESULT OF A CUSTOMER SERVICE COMPLAINT, DRIVE CAM VIDEO, OR OTHER VIDEO

RECEIVED
BOARD OF SUPERVISORS
SAN FRANCISCO
2011 NOV - 7 PM 3:30
BY _____

SUBMITTED AS PART OF A CUSTOMER SERVICE COMPLAINT, THE DIVISION SUPERINTENDENT SHOULD OFFER THE OPERATOR AN OPPORTUNITY TO WATCH THE VIDEO OR PHOTOS PROVIDED BY THE COMPLAINANT AND THE DRIVE CAM VIDEO. IN ADDITION, THE PARTIES ACKNOWLEDGE THAT SFMTA HAS PROVIDED THE UNION WITH AN ACCESS NUMBER OR PASSWORD TO DRIVE CAM VIDEO, AND THE UNION MAY WATCH DRIVE CAM VIDEO WITHOUT WAITING FOR A MEETING WITH THE DIVISION SUPERINTENDENT. MR HILL EVEN UNDER THE MEMORANDUM OF UNDERSTANDING THESE PHOTOS, GRAPH, DATA CHARTS, TABLES OR SIMILAR DOCUMENTS ON ALL ISSUES COVERED BY THE MOU. "DO EXIT" AND SHOWS YOU ARE NOT COMPLYING WITH THE SUNSHINE TASK FORCE ORDINANCE. AGAIN, I AM REQUESTING THAT THESE DOCUMENTS RELATED TO DRIVE CAM DISCIPLINE: THIS LETTER WILL BE FORWARDED TO SUNSHINE TASK FORCE: FIFTEEN DAYS TO ADHERE TO.

THANK YOU,

FRANK MCDOWELL