

Date: Dec. 14, 2011

Item No. 6 & 7
File No. 11071

SUNSHINE ORDINANCE TASK FORCE

AGENDA PACKET CONTENTS LIST*

- Ray Hartz against Dennis Herrera of the City Attorney's Office**
-
-
-
-
-
-
-
-
-
-

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

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

MEMORANDUM

October 21, 2011:

RAY HARTZ VS. CITY ATTORNEY DENNIS HERRERA (11071)

COMPLAINT

THE COMPLAINANT ALLEGES THE FOLLOWING:

Complainant Ray Hartz alleges that City Attorney Dennis Herrera violated sections 67.15(d), 67.16, and 67.21(i) of the Ordinance by acting as legal counsel for Charter boards and commissions for the purpose of denying access to the public in regard to the inclusion of written statements by members of the public in minutes of meetings of public bodies.

COMPLAINANT FILES COMPLAINT:

On October 4, 2011, Mr. Hartz filed a complaint with the Task Force.

JURISDICTION

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

APPLICABLE STATUTORY SECTION(S):

Sunshine Ordinance (S.F. Administrative Code Section 67.1, et seq.)

- Section 67.15(d) deals with a policy body abridging or preventing public criticism of its actions.
- Section 67.16 governs the inclusion in the minutes of an 150-word statement of a member of the public summarizing their public comment made during a meeting.
- Section 67.21(i) deals with the duties of the City Attorney with regard to public meetings and public information.

APPLICABLE CASE LAW:

None.

ISSUES TO BE DETERMINED

Uncontested/Contested Facts: Mr. Hartz alleges that, despite SOTF rulings on complaints 10054 and 11054, the City Attorney "continues to advise City [] boards to ignore these rulings. In doing so, he has violated and continues to encourage others to violate [] the Ordinance."

Memorandum

DATE: October 21, 2011
PAGE: 2
RE: Hartz v. CA Herrera (11071)

The Task Force has previously found in the above-mentioned complaints that section 67.16 of the Ordinance requires that "the Ordinance states in simple, plain language that the 150-word statement must be "in the minutes" and that requirement is not satisfied by attaching the statement as an addendum at the end of the minutes. The Task Force further noted that the statements should be within the body of the minutes to prevent public officials from unlawfully abridging unwanted or critical public comment." See Order of Determination, Complaint 11054.

The City Attorney's Office does not dispute that it continues to give advice that differs from the ruling of the Task Force in Complaint 11054. Their response to the complaint states that the City Attorney has continued to advise "the Library Commission that it may include the 150-word summary as an attachment to the minutes. We also advised the Library Commission that if the commentator's summary is included as an attachment to the minutes, the text of the minutes should cross-reference the attachment so as to direct the reader to the attachment. While not required by the Sunshine Ordinance, the cross referencing will facilitate public access to written summaries of comments."

Thus, the facts do not appear to be in dispute; only the interpretation of what is legally required of the City Attorney in providing advice on this issue.

QUESTIONS THAT MIGHT ASSIST IN DETERMINING FACTS:

- What is the nature of the legal advice provided to the Library Commission by the Deputy City Attorney on this issue?
- Does it consist of advising the Commission as to its legal obligations under the Ordinance and options to best achieve compliance with those obligations?
- Or is it for the purpose of the advice for the purpose of preventing access by the public, in violation of section 67.21(i) of the Ordinance?

LEGAL ISSUES/LEGAL DETERMINATIONS:

- Does section 67.21(i) of the Ordinance prohibit the City Attorney from advising boards and commissions on their options for best complying with the requirements of the Ordinance?
- If so, is this prohibition preempted by requirements under state law and the municipal Charter requiring that the City Attorney provide legal advice to City and County departments and requiring that departments be able to seek that advice from their counsel when needed?

SUGGESTED ANALYSIS

In *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, the California Supreme Court was faced with an apparent conflict between principles of open government and secrecy when it looked at whether attorney-client privileged documents must be disclosed under the Public Records Act. In analyzing the issue, the court stated:

A city [department] needs freedom to confer with its lawyers confidentially in order to obtain adequate advice, just as does a private

Memorandum

DATE: October 21, 2011
PAGE: 3
RE: Hartz v. CA Herrera (11071)

citizen who seeks legal counsel []. The public interest is served by the privilege because it permits local government agencies to seek advice that may prevent the agency from becoming embroiled in litigation, and it may permit the agency to avoid unnecessary conflict with various members of the public.

City of Palmdale, supra, 5 Cal.4th at 380-381.

While the complaint before the Task Force in this instance does not directly involve the attorney-client privilege, it implicates the very principles that underlie that privilege: the need for City departments to obtain adequate advice from their legal counsel, the City Attorney. As *City of Palmdale* makes clear, City departmental clients should have the freedom to seek their counsel's best advice on legal issues, such as the legal requirements of the Ordinance and their options for complying with those requirements.

The San Francisco Charter vests in the City Attorney the sole authority and the duty to act as the City's independent legal advisor. *Charter Section 6.102*. By making the City Attorney the sole legal representative of City departments, officials, and employees, the Charter generally vests in that independently elected officer the full rights and obligations inherent in an attorney-client relationship under state law. In addition, subsection 4 of this charter section specifically includes among the obligations that the City Attorney owes to client departments the duty to provide legal advice. Moreover, as an independently elected official who acts as the legal representative of all City departments, officials, and employees, the CAO has full discretion in determining how to advise and represent his or her clients.

As a charter provision, this section would override the Sunshine Ordinance to the extent the two are in conflict. *City and County of San Francisco v. Patterson* (1988) 202 Cal.App.3d 95, 102-103. Where the Sunshine Ordinance seeks to impose requirements on City departments that are separate and distinct from those of the Brown Act, those distinct local requirements must give way to charter provisions with which they conflict. The Sunshine Ordinance is not cloaked in the supremacy of state law over local law simply because it addresses the same subject matter as the Brown Act. While provisions of state law may supersede charter requirements in certain circumstances, there is no provision in the Brown Act that prevents a City Attorney from advising her client as to the legal requirements imposed by that statute or similar, local statute, such as the Sunshine Ordinance.

In contrast, several requirements of state law *do* apply to the attorney client relationship created by Charter Section 6.102. For example, city and county lawyers are generally subject to the same ethical requirements as those in private practice when representing their clients. (See, e.g., *People ex rel. Younger v. Superior Court* (1979) 86 Cal.App.3d 180, 192; *Ward v. Superior Court* (1977) 70 Cal.App.3d 23, 30.) An attorney is required to apply the diligence, learning, and skill reasonably necessary to perform the legal services requested by the client. (Cal. Rules Prof. Conduct, Rule 3-110.) An attorney may breach the standard of care owed to the client if she fails to inform the client fully about its rights and the alternatives available to the client under the circumstances and the likelihood of their success. See *Considine Co. v. Shadle, Hunt & Hagar*

Memorandum

DATE: October 21, 2011
PAGE: 4
RE: Hartz v. CA Herrera (11071)

(1986) 187 Cal.App.3d 760, 765. An attorney may not advise a client to violate the law, unless the attorney believes in good faith that the law is invalid. (Cal. Rules Prof. Conduct, Rule 3-210; *Wolfrich Corp. v. United Services Automobile Assn.* (1983) 149 Cal.App.3d 1206, 1211.)

The Task Force is thus faced with the task of interpreting the requirements of Section 67.21(i), in light of these principles of state law that apply to the City Attorney's representation of its clients through Charter Section 6.102. Section 67.21(i) provides that the City Attorney's Office "**shall not act as legal counsel for any city employee or any person having custody of any public record for purposes of denying access to the public.**" In providing adequate legal advice to City departments, the City Attorney must seek to advance the valid goals of its client while also ensuring that the client's actions comply with the requirements of the Ordinance. The City Attorney is obliged under the charter and under state law to provide such advice.

If Section 67.21(i) is interpreted to mean that the City Attorney is prohibited from advising client departments in the manner required by the charter and state law, then it must give way to those superior requirements of law. If, instead, Section 67.21(i) is interpreted as prohibiting the City Attorney from advising a client department to act in a manner the City Attorney believes would violate the valid provisions of the Sunshine Ordinance and the Brown Act, it is consistent with the charter and state law. Where there is a possible conflict between a statutory enactment and a superior law, "the enactment may be validated if its terms are reasonably susceptible to an interpretation consistent with the [superior law]. [] [T]he court should construe the enactment so as to limit its effect and operation to matters that may be [permissibly] [] prohibited." *Welton v. City of Los Angeles* (1976) 18 Cal.3d 497, 505. Therefore, where a statutory provision is susceptible to two interpretations, one of which would render it invalid and one of which would render it valid, it should be interpreted in the manner that renders it valid. Section 67.21(i) therefore should be interpreted to allow the City Attorney to provide its best advice as to how to comply with the requirements of the Ordinance. Absent clear and convincing evidence that the City Attorney provided deliberately incorrect advice "**for purposes of denying access to the public,**" section 67.21(i) should have no bearing on the rendering of such advice.

CONCLUSION

THE TASK FORCE FINDS THE FOLLOWING FACTS TO BE TRUE:

THE TASK FORCE FINDS THE ALLEGED VIOLATIONS TO BE TRUE OR NOT TRUE.

Memorandum

DATE: October 21, 2011
 PAGE: 5
 RE: Hartz v. CA Herrera (11071)

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

SEC. 67.15. PUBLIC TESTIMONY.

(d) A policy body shall **not abridge or prohibit public criticism** of the policy, procedures, programs or services of the City, or **of any other aspect of its proposals or activities, or of the acts or omissions of the body**, on the basis that the performance of one or more public employees is implicated, or **on any basis other than reasonable time constraints** adopted in regulations pursuant to subdivision (c) of this section.

SEC. 67.16. MINUTES.

The clerk or secretary of each board and commission enumerated in the charter shall record the minutes for each regular and special meeting of the board or commission. The minutes shall state the time the meeting was called to order, the names of the members attending the meeting, the roll call vote on each matter considered at the meeting, the time the board or commission began and ended any closed session, the names of the members and the names, and titles where applicable, of any other persons attending any closed session, a list of those members of the public who spoke on each matter if the speakers identified themselves, whether such speakers supported or opposed the matter, a brief summary of each person's statement during the public comment period for each agenda item, and the time the meeting was adjourned. Any person speaking during a public comment period may supply *a brief written summary of their comments which shall, if no more than 150 words, be included in the minutes.*

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

(i) The San Francisco City Attorney's office shall act to protect and secure the rights of the people of San Francisco to access public information and public meetings and **shall not act as legal counsel for any city employee or any person having custody of any public record for purposes of denying access to the public.**

SAN FRANCISCO MUNICIPAL CHARTER

SEC. 6.102. - CITY ATTORNEY.

The City Attorney shall:

1. Represent the City and County in legal proceedings with respect to which it has an interest;
[]
2. Represent an officer or official of the City and County when directed to do so by the Board of Supervisors, unless the cause of action exists in favor of the City and County against such officer or official;

Memorandum

DATE: October 21, 2011
PAGE: 6
RE: Hartz v. CA Herrera (11071)

3. Whenever a cause of action exists in favor of the City and County, commence legal proceedings when such action is within the knowledge of the City Attorney or when directed to do so by the Board of Supervisors, except for the collection of taxes and delinquent revenues, which shall be performed by the attorney for the Tax Collector;

4. Upon request, provide advice or written opinion to any officer, department head or board, commission or other unit of government of the City and County;

[]



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 ATTORNEY

Name of individual contacted at Department or Commission DEWIDIS HERRERA

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

Sunshine Ordinance Section 67.21(i) 67.15(d) 67.16
 (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.

DESPITE SOTF RULINGS IN CASES #10054 AND #11054, CITY ATTORNEY DEWIDIS HERRERA CONTINUES TO ADVISE CITY DEPARTMENTS & BOARDS TO IGNORE THOSE RULINGS. IN DOING SO HE HAS VIOLATED & CONTINUES TO ENCOURAGE OTHERS TO VIOLATE THE ABOVE CITED SECTIONS OF THE SUNSHINE ORDINANCE

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 RAY W HARTZ, JR Address 839 LEAVENWORTH ST #304 SAN FRANCISCO CA 94109

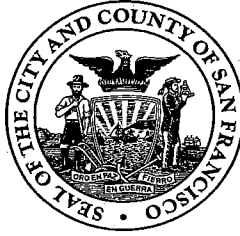
Telephone No. (415) 345-9144 E-Mail Address RWHARTZJR@SBCGLOBAL.NET

Date 10/4/11 Ray W Hartz
 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).

**SUNSHINE ORDINANCE
TASK FORCE**



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

ORDER OF DETERMINATION
September 3, 2011

DATE THE DECISION ISSUED
August 23, 2011

RAY HARTZ v LUIS HERRERA OF THE PUBLIC LIBRARY (CASE NO. 11054)

FACTS OF THE CASE

Complainant Ray Hartz alleges that the San Francisco Public Library (the "Library") and City Librarian Luis Herrera violated Section 67.16 of the Sunshine Ordinance by failing to include in the body of the official minutes written statements of not more than 150 words submitted by himself and other members of the public summarizing their public testimony. Mr. Hartz complains specifically about the minutes of the May 19, 2011 and June 16, 2011 general meetings of the Library Commission. Mr. Hartz further alleges that this violation occurred at the July 21, 2011 meeting of the Commission when it approved the minutes at issue in this complaint. Mr. Hartz further alleges that the violation is that of the Library and Mr. Herrera because the Library employs Commission Secretary Sue Blackman and Mr. Herrera supervises her work. Mr. Hartz further alleges that the above violation occurred after the Task Force referred Sunshine Ordinance Complaint 10054, a previous identical violation, to the Ethics Commission.

COMPLAINT FILED

On July 26, 2011, Mr. Hartz filed a complaint with the Task Force alleging a violation of Section 67.16 of the Ordinance.

HEARING ON THE COMPLAINT

On August 23, 2011, Mr. Hartz presented his case to the Task Force. Library Commission Vice President Lee Munson and Secretary Sue Blackman represented the Library and City Librarian Luis Herrera.

Mr. Hartz testified that Mr. Herrera is Ms. Blackman's immediate supervisor and it is his obligation to ensure she performs her duties according to the law, which includes complying with decisions made by the Task Force. Ms. Blackman, he said, presented two sets of minutes for approval to the Library Commission, knowing that his 150-word statements were included as addenda and not within the body of the minutes as the Task Force had ruled in an earlier case.

He said although he reminded the Library Commission of the Task Force's decision, it nevertheless approved the minutes as presented. The Task Force, he said, specifically ordered Ms. Blackman to place the 150-word statement in the body of the minutes. Yet, he said, she was instructed by her superior not to follow the law. He also reminded the Task Force that it had voted 8-0 to put the 150-word statement in the body of the minutes and that the City Attorney was to be informed of its decision.

Ms. Blackman testified she and Mr. Herrera are at-will employees who report directly to the Library Commission. Mr. Herrera, she said, is her day-to-day supervisor but the policy regarding minutes is set by the Library Commission and Mr. Herrera does not have a role in it. She said the issue has already been addressed by the Task Force in a previous complaint and that the matter was with the Ethics Commission pending a final outcome. She said she was following the advice of the City Attorney's Office which is that the 150-word statement can be added as an addendum to the minutes. Mr. Munson said the Sunshine Ordinance does not indicate specifically where the placement should be. All it says is that the 150-word statement be included in the minutes, he said. He said the critical statements repeated verbatim by certain members of the public on each agenda item prevent an orderly flow to the minutes which then fail to reflect the events of the meeting. Ms. Blackman further stated that the Library Commission would be considering whether to add language to their minutes that clearly stated that the addendum was a part of the minutes, in order to remove any potential confusion.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After duly considering the testimony and other evidence presented, along with its prior rulings on the issue, the Task Force found that an addendum is an attachment to a document, not part of the document, and, accordingly, an addendum is not "in the minutes" as required under the Ordinance. The Task Force found that the Ordinance states in simple, plain language that the 150-word statement must be "in the minutes" and that requirement is not satisfied by attaching the statement as an addendum at the end of the minutes. The Task Force further noted that the statements should be within the body of the minutes to prevent public officials from unlawfully abridging unwanted or critical public comment.

DECISION AND ORDER OF DETERMINATION

The Task Force finds Luis Herrera of the Public Library in willful violation of Sunshine Ordinance Section 67.16 pursuant to Section 67.34 for willful failure to include the 150-word summary in the body of the minutes after a previous Order of Determination specifically instructed the Library Commission to include such statements in the body of the minutes.

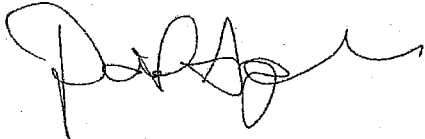
Mr. Herrera and the Library Commission shall make the changes necessary to include the summaries within the body of the minutes to comply with this Order of Determination and are instructed to appear before the Compliance and Amendments Committee on Tuesday, September 13, at 4 p.m. in Rm. 406 at City Hall.

This Order of Determination was adopted by the Sunshine Ordinance Task Force on August 23, 2011, by the following vote: (Costa/Johnson)

Ayes: Snyder, Knee, Washburn, Costa, West, Johnson
Excused: Cauthen, Manneh, Knoebber, Wolfe, Chan



Hope Johnson, Chair
Sunshine Ordinance Task Force

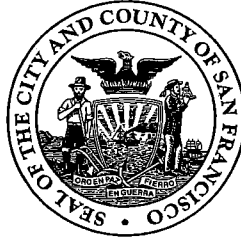


David Snyder, Esq., Member, Seat #1*
Sunshine Ordinance Task Force

- c: Ray Hartz, Complainant
City Librarian Luis Herrera, Respondent
Library Commission Vice-President Lee Munson, Respondent
Commission Secretary Sue Blackman, Respondent
Jerry Threet, Deputy City Attorney

*Sunshine Ordinance Task Force Seat #1 is a voting seat held by an attorney specializing in sunshine law.

**SUNSHINE ORDINANCE
TASK FORCE**



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

ORDER OF DETERMINATION
February 7, 2011
(Revised September 27, 2011)

DATE THE DECISION ISSUED
January 25, 2011

RAY HARTZ v LIBRARY COMMISSION (CASE NO. 10054)

FACTS OF THE CASE

Complainant Ray Hartz alleges that the Library Commission (the "Commission" or "Respondent") violated the Sunshine Ordinance by failing to include in the text of the official minutes of its September 16, 2010, meeting his written statement of not more than 150 words. Mr. Hartz alleges that the Commission instead included a summary that did not accurately reflect his testimony. Mr. Hartz's complaint identifies Sunshine Ordinance ("Ordinance") Section 67.16 as having been violated. In his supplemental complaint, Mr. Hartz alleges that the above actions constituted a violation of Section 67.15 of the Ordinance by abridging his public testimony.

COMPLAINT FILED

On October 14, 2010, Mr. Hartz filed a complaint with the Task Force alleging a violation of the Ordinance. On October 20, 2010, Mr. Hartz amended his complaint with supplemental allegations of an additional violation of the Ordinance.

HEARING ON THE COMPLAINT

On January 25, 2011, Mr. Hartz presented his case before the Task Force. Mary Hudson appeared on behalf of the Commission.

Mr. Hartz told the Task Force that the Sunshine Ordinance allows for the inclusion of a 150- or fewer-word summary in the minutes. He said the Commission argues that its practice is supported by the Good Government Guide, which is not the law. He said he has repeatedly appeared before the Commission and have stated what the law requires. Instead, he said, the Commission's practice is to attach it as an addendum and make no mention of it in the body of the minutes. Another problem, he said, is that the Commission puts its own view of what was said in the minutes rather than what was actually said. If he had positive things to say, it would be in the minutes but if he had harsh words, the Commission would limit it or tone it down, he said.

Ms. Hudson of the City Librarian's Office said she was representing Commission Secretary Sue Blackman, who had earlier requested through two emails to the Task Force that the item not be placed on the current agenda because she would be unable to attend as she was on a planned vacation. Ms. Hudson requested that the item be continued to allow for Ms. Blackman's attendance at a future date. Chair Knee denied the request after sensing that members wanted the case heard. She then told Chair Knee that only Ms. Blackman, who is the Commission's lone staff person, was familiar with the complaint. Chair Knee said if that was the case, Commission President Jewelle Gomez should have made an alternate arrangement, including sending one of the seven commissioners.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

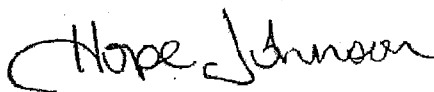
Judging from the testimony and evidence presented, the Task Force finds the testimony of Mr. Hartz to be persuasive.

DECISION AND ORDER OF DETERMINATION

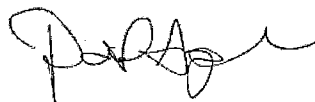
The Task Force finds that the Commission violated Sunshine Ordinance Section 67.15 by altering Mr. Hartz's statement as it constituted an abridgement of the submission and Section 67.16 for attaching the statement as an addendum and not placing it within the body of the minutes. The Task Force also found Ms. Gomez in violation of Section 67.21(e) for not sending a person knowledgeable in this matter to the hearing. The agency shall make the necessary changes and appear before the Task Force on March 22, 2011.

This Order of Determination was adopted by the Sunshine Ordinance Task Force on January 25, 2011, by the following vote: (Washburn / Chan)

Ayes: Snyder, Manneh, Washburn, Knoebber, Wolfe, Chan, Johnson, Knee
Excused: Cauthen



Hope Johnson, Chair
Sunshine Ordinance Task Force



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

c: Ray Hartz, Complainant
Sue Blackman, Respondent
Jewel Gomez, Commission President
Jerry Threet, Deputy City Attorney

*Sunshine Ordinance Task Force Seat #1 is a voting seat held by an attorney specializing in sunshine law.



Re: Complaint Number 11071 (against Dennis Herrera, City Attorney)
Jack Song to: SOTF, Chris Rustom

10/18/2011 05:35 PM

Chris Rustom
Sunshine Ordinance Task Force
1 Dr. Carlton B. Goodlett Place
City Hall, Room 244
San Francisco, CA 94102

Re: Complaint Number 11071 (against Dennis Herrera, City Attorney)

Dear Mr. Rustom and Members of the Sunshine Ordinance Task Force:

This letter responds to the above complaint relating to the legal advice given by this office regarding Sunshine Ordinance Task Force Orders of Determination ["SOTF Orders"] matter numbers 10054 and 11054. Mr. Hartz alleges violations of Sunshine Ordinance Sections 67.21(i), 67.15(d), and 67.16.

Sections 67.15(d) ["A policy body shall not abridge or prohibit public criticism...."] and 67.16 ["The clerk or secretary of each board and commission enumerated in the Charter shall record the minutes for each regular and special meeting of the board or commission...."] apply to policy bodies. With respect to section 67.21, this office has advised the Library Commission, the subject of SOTF Orders 10054 and 110054, that a policy body may attach the 150-word statement as an addendum to the minutes. We also recommended that the body of the minutes include a reference to the statement. This advice is consistent with SOTF Order 10054. We explain that legal advice again here.

Summary of Advice

Section 67.16 of the Sunshine Ordinance states: "Any person speaking during a public comment period may supply a brief written summary of their comments which shall, if no more than 150 words, be included in the minutes." (S.F. Admin. Code § 67.16.)

The City Attorney's Good Government Guide, which is available on the City Attorney's website (under "Resources"), addresses this provision. The Good Government Guide states, at page 134: The Sunshine Ordinance allows any person who spoke during a public comment period at a meeting of a Charter board or commission to supply a brief written summary of the comments to be included in the minutes if it is 150 words or less. Admin. Code § 67.16. The summary is not part of the body's official minutes, nor does the body vouch for its accuracy; and the minutes may expressly so state. The summary may be included as an attachment to the minutes.

In addition, if the commentator's summary is included as an attachment to the minutes, we recommend that the text of the minutes cross-reference the attachment so as to direct the

reader to the attachment. While the Sunshine Ordinance does not require the cross-reference, it will facilitate public access to written summaries of comments.

Background

On January 25, 2011, the Sunshine Ordinance Task Force issued Order 10054 stating that "the Task Force had found in a previous ruling that placing the 150-word statement as an addendum was acceptable if it was mentioned in the body of the minutes." On June 1, 2011, our office advised the Library Commission consistent with the ruling in case number 10054. On August 23, 2011, the Sunshine Ordinance Task Force issued Order 11054, in which it changed its position on the 150-word summary. In that decision, the Task Force found that "an addendum is not 'in the minutes' as required under the ordinance," and that attaching the 150-word statement did not satisfy the requirement that the statement be "in the minutes."

Analysis

Although the Sunshine Ordinance Task Force changed its position on whether a policy body may attach the 150 word statement as an addendum its minutes rather than including the statement in the body of the minutes, the City Attorney Office has not changed its advice. Pursuant to the June 1, 2011 memorandum, the Sunshine Ordinance Task Force ruling from case number 10054, and the Good Government Guide, this office has advised the Library Commission that it may include the 150-word summary as an attachment to the minutes. We also advised the Library Commission that if the commentator's summary is included as an attachment to the minutes, the text of the minutes should cross-reference the attachment so as to direct the reader to the attachment. While not required by the Sunshine Ordinance, the cross referencing will facilitate public access to written summaries of comments.

Very Truly Yours,

JACK SONG
Public Information Officer

OFFICE OF CITY ATTORNEY DENNIS HERRERA
San Francisco City Hall, Room 234
1 Dr. Carlton B. Goodlett Place
San Francisco, California 94102-4682

(415) 554-4653 Direct
(415) 554-4700 Reception
(415) 554-4715 Facsimile
(415) 554-6770 TTY
www.sfcityattorney.org



Fw: Recent email with Rick Knee

Ray Hartz Jr

to:

SOTF

10/28/2011 09:19 AM

Cc:

Hope Johnson, MSW Bruce Wolfe, James Chaffee, Peter Warfield, Allen Grossman, kimo

Hide Details

From: Ray Hartz Jr <rwhartzjr@sbcglobal.net> Sort List...

To: SOTF <sotf@sfgov.org>

Cc: Hope Johnson <hopeannette@earthlink.net>, MSW Bruce Wolfe <sotf@brucewolfe.net>, James Chaffee <chaffeej@pacbell.net>, Peter Warfield <libraryusers2004@yahoo.com>, Allen Grossman <grossman356@mac.com>, kimo@webnetic.net

Mr. Rustom,

Please see that a copy of this email is included in the printed matter for hearing #11071 Ray Hartz v Dennis Herrera, City Attorney.

Please also ensure that a copy of Mr. Knee's communication with Mr. Francke is included with the same materials relating to the case. I am really disappointed that the original email was given to the members of the Task Force without my knowledge and without my receiving a copy. This is particularly true, given that the item was agendized at the last full SOTF meeting. Had the matter come before the Task Force, I would have been unfairly disadvantaged by having this information presented without a chance to clarify the facts. **This matter was presented to Mr. Francke without any background, especially the fact that the Task Force has already ruled twice on this matter.** The way in which it was presented to Mr. Francke, perhaps to elicit a particular response, needs to be fully considered by the Task Force members in their deliberations.

Sincerely,

Ray W. Hartz, Jr.

Director, San Francisco Open Government

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

From: Terry Francke <terry@calaware.org>

To: rwhartzjr <rwhartzjr@sbcglobal.net>

Sent: Thu, October 27, 2011 4:54:12 PM

Subject: Re: Recent email with Rick Knee

Mr. Hartz,

I answered the question that Mr. Knee appeared to be asking. He did not mention the two determinations by the SOTF on the issue that you refer to.

Distorting a speaker's comments or selectively making certain comments harder to find based on their viewpoint is an entirely different question from whether the ordinance requires inclusion of comments within the body of the minutes or not.

Terry Francke
terry@calaware.org

On Oct 27, 2011, at 4:08 PM, rwhartzjr wrote:

Mr. Francke,

My name is Ray Hartz. You recently had an extremely brief email interchange with Rick Knee of the Sunshine Ordinance Task Force in San Francisco.

You seemed to tell Mr. Knee that there is NO requirement that 150 word summaries be included in the body of the minutes even though the clear wording of the Sunshine Ordinance says they should. I have received two determinations from the Task Force that "in the minutes" means in the body of the minutes. They indicated that their decision was to ensure that a legislative body cannot censor and/or abridge public comment. I have at least a dozen instances with the San Francisco Public Library Commission, where they took what I said and completely eviscerated the comments.

My position is that allowing the appendage to the minutes permits those comments to be suppressed. I submitted a 150 word summary, which I read verbatim, to the San Francisco Ethics Commission. If you go to their website and print a copy of those minutes, the appended comments do not show up. You have to know that there is a link in the body of the minutes on which a member of the public has to click to have the summary show up. It also places the 150 word summaries in a position of secondary importance, which certainly can lead some to believe they are less than valid, especially when preceded by a disclaimer saying the body doesn't endorse the comments. Also, appending the statements completely removes them from the context of the discussion, which in some cases will make readers unclear as to the points being addressed by the member of the public. I believe this is true of anything in the minutes: a lot of different opinions make it into the official record, and approving the minutes does not endorse anything. Approval of the minutes simply represents that it is an accurate and factual record of what occurred. Simply placing the 150 word summary in the minutes preceded by a neutral statement, such as: "The following summary was provided by (insert name)", does not place a requirement

on the body to endorse the comments, only to approve the minutes as accurate.

Your extremely brief comment, "no requirement to include them in the text," seems to imply that the Sunshine Ordinance Task Force does not have the authority to decide that the law means exactly what it says. I believe this is one of the reasons the Task Force is there: to provide guidance to City agencies, etc. about what the law does or does not mean. This does, as stated earlier, allow the legislative body to censor the comments they don't like. In one of the two cases heard by SOTF, the Vice-President of the Library Commission admitted they don't want to include the comments because they don't like what is being said. **I do really feel this is the bottom line in this argument: viewpoint discrimination.** They may not be able to stop a member of the public from making comments (though they try), but, they'll be damned sure that as few people actually see the comment or are allowed to consider their meaning.

I personally believe that to allow a legislative body to handle the publication of statements made by the public in ways that misrepresent what the person said is a clear violation of the First Amendment. The rights to petition government for a redress of grievances and the idea of free speech, an particularly "political" free speech are central to our system of government. Any person should have the right, especially when the law clearly says they can, to provide a short summary and have it represent their thoughts and words.

At no time, throughout the past two years, has the City Attorneys Office provided any "compelling state interest" in keeping the summaries out of the minutes. As a free speech issue, don't you feel they should have some justification? Instead, they rely on the fact that the law doesn't specifically state what should be in the minutes as justification for putting in and/or excluding anything they want. Their argument is that appending them is the "same thing" as including them: a specious argument at best. They simply don't like the idea that a citizen could actually get "unapproved" comments into the record.

I sincerely hope that your response to Mr. Knee was based on the absence of a complete understanding of the history of this effort and the rationale behind it.

Sincerely,
Ray Hartz, Director
San Francisco Open Government



Fwd: Re: Minutes

Richard Knee

to:

SOTF

10/25/2011 12:14 AM

Cc:

SFCityAtty_Threet Jerry, Angela Calvillo, Rick Caldeira

Hide Details

From: Richard Knee <rak0408@earthlink.net>

To: SOTF@SFGov.org

Cc: SFCityAtty_Threet Jerry <Jerry.Threet@sfgov.org>, Angela Calvillo <Angela.Calvillo@sfgov.org>, Rick Caldeira <Rick.Caldeira@sfgov.org>

To:

Chris,

Please print this out for distribution at today's SOTF meeting to SOTF members; to the parties-in-interest in agenda Items 20-21 (#11071, Ray Hartz vs. City Attorney/Herrera); and to members of the public.

Thanks,

Rick

----- Original Message -----

Subject:Re: Minutes

Date:Mon, 24 Oct 2011 16:18:35 -0700

From:Terry Francke <terry@calaware.org>

To:Richard Knee <rak0408@earthlink.net>

No requirement to include them in the text.

On Oct 24, 2011, at 3:39 PM, Richard Knee wrote:

- > Sunshine Ordinance Task Force and SF city attorney disagree on
- > whether public-comment summaries in minutes may be appended, with
- > appropriate links/footnotes, or must be included in the text of the
- > minutes.
- >
- > Relevant language is in Sunshine Ordinance Sec. 67.16 but doesn't
- > seem to address the dispute directly: "Any person speaking during a
- > public comment period may supply a brief written summary of their
- > comments which shall, if no more than 150 words, be included in the
- > minutes."
- >
- > Your thoughts?
- >
- > Thanks,
- > Rick