

Date: Feb. 22, 2011

Item No. 20 & 21
File No. 10075

SUNSHINE ORDINANCE TASK FORCE

AGENDA PACKET CONTENTS LIST*

- Anonymous against the Department of Recreation and Park**
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Completed by: Chris Rustom

Date: _____

***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.



<complaints@sfgov.org>

02/16/2011 10:09 AM

To <sotf@sfgov.org>

cc

bcc

Subject Sunshine Complaint

To:sotf@sfgov.orgEmail:complaints@sfgov.orgDEPARTMENT:Department of Recreation and Parks

CONTACTED:

PUBLIC_RECORDS_VIOLATION:Yes

PUBLIC_MEETING_VIOLATION:No

MEETING_DATE:

SECTIONS_VIOLATED:

DESCRIPTION:Failure to release the following record: audio/video recording, or transcript, of closed-door session, Recreation Park Commission hearing of October 7, 2010.

HEARING:Yes

PRE-HEARING:No

DATE:Dec. 17, 2010

NAME:Anonymous

ADDRESS:

CITY:

ZIP:

PHONE:

CONTACT_EMAIL:

ANONYMOUS [REDACTED]@hotmail.com

CONFIDENTIALITY_REQUESTED:Yes

Administrator of the Sunshine Ordinance Task Force
City Hall, Room 244

Contact: [REDACTED]@hotmail.com

Please accept this Sunshine Ordinance complaint, against the Recreation/Park Commission, for failure to release the following record: audio/video recording, or transcript, of closed-door session, Recreation/Park Commission hearing of October 7, 2010.

On my behalf, Robert Divelbiss of Collette, Erickson, Farmer & O'Neill LLP submitted a previous request for this record to the Recreation/Park Commission. [See attached: Collete/Erickson letter, 11/17/10]. The Commission response was perfunctory and, I believe, failed to address the arguments made for release of the record. [See attached: Recreation/Park letter, Olive Gong, 12/7/2010]

Note: A copy of this correspondence has been sent to the City Attorney, Supervisor of Records. That office is aware of this submission as well. I submit this request as an anonymous report. Please use the email address above for questions, status and other communication.

The Recreation/Park Commission entered into closed-door session on October 7 to discuss one instance of possible litigation, as potential plaintiff [Item 9a]. As outlined in Mr. Divelbiss' letter, the Chair's comments in the public audio/video record make clear that the closed-door session discussion was directly related to Item 10 on the meeting agenda [Murphy-Windmill].

As Mr. Divelbiss also noted, Recreation/Park staff submitted a memo, "Re: Golden Gate Park Murphy Windmill- Award of Personal Services Contract" [hereon referred to as "Recreation/Park Memo"], as supplemental material for Item 10. The memo fully documents the background to the issue and makes clear that the only plausible defendant to the potential litigation discussed in closed-door session was Bloemendal Construction. The statute of limitations for any action against Bloemendal has expired (Chapter 7 bankruptcy filing occurred without the City having filed a claim). The release of the transcript is therefore required [SF Admin Code 67.8-1(a)].

In the very unlikely event the Commission met to discuss an action against Verbij, then Commission Resolution 0010-010 constitutes removal of the underlying dispute, and also a settlement with Verbij, and release of the transcript is required [SF Admin Code Sec. 67.8-1(a), Sec. 67.12.(3)].

The department's attempt to now assert attorney-client privilege is inappropriate. The relevant portion of the Sunshine Ordinance [67.8-1(a)] presumes that a closed-door session, based on an assertion of attorney-client privilege, has occurred. The intent is to require disclosure in this context, if additional conditions, as discussed above, exist.

Further, the Recreation/Park Memo discloses the financial background to the Murphy-Windmill issue, including facts that clearly formed the basis of the closed-door discussion. Even if the department wishes to claim privilege for the discussion through citation of the California Evidence code, it is unlikely that any undisclosed material (covered by that code) exists in the closed-door session. Further, even if such material did exist, the Commission can produce a transcript of the closed-door session that is selectively redacted of that specific factual material.

There is an additional, compelling reason to release the closed-door session [Item 9a]. The record for public agenda Item 10 needs to be repaired. The Commission improperly subsumed complete discussion of this item within the closed-door session, and then failed to repeat any portion of that discussion upon return to open session. The disclosure of the closed-door session, hopefully, will correct the serious omission that now exists in the record for Item 10.

To date, the Commission's actions do not show concern for the public interest when creating and archiving, or considering disclosure of, the items. The entire debate regarding release of the close-door session [Item 9e] consisted of a single remark by the Chair: "I don't think we want to talk about it." [SFGTV time code 3:42:08]. Further, and stunningly, the Commission now claims that no audio recording of the closed-door session exists. [See attached letter, Recreation/Park Department] The Commission, via department staff, provides no explanation for this serious failure to create a proper record other than "technical or operator failure." Interestingly, the City Hall Media Services Group received no report of problems with the recording equipment during or after the meeting.

I ask that an outside party examine the digital media used by the Commission clerk to determine if the audio recording can be recovered. If no recording of the closed-door session can be found or recovered, I request that a transcript be created and released to the public from the Commission Secretary's notes.

**COLLETTE ERICKSON
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November 17, 2010

**Via Facsimile to 415.221.8034
and U.S. Mail**

San Francisco Recreation and Park Commission
501 Stanyan Street
San Francisco, CA 94117

**Re: Request for Immediate Release to the Public: Transcript and Audio/Video
Recoding of Closed Session During October 7, 2010 Rec/Park Commission
Hearing**

To Whom It May Concern:

This office represents a resident of the City and County of San Francisco. On behalf of our client, we respectfully request that the Commission release a transcript and/or audio-video record of the closed-door session that occurred during the October 7, 2010 meeting.

It is our belief that the closed session was entered into incorrectly, that the scope of discussion extended beyond the allowable topic, and that discussion and deliberation of a public agenda item [#10] was subsumed into the closed session. Further, conditions now exist that require disclosure regardless of the above: the "statute of limitations" for the anticipated litigation discussed has effectively expired and/or the source of controversy has been resolved.

I. Sequence of Events

At the meeting, the Commission entered into closed-door session [Item 9a] for consideration of litigation, with the City as potential plaintiff. Upon return to public session, the Commission voted not to disclose any portion of the closed-door record [Item 9e].

The Commission next began consideration of Item 10: GOLDEN GATE PARK MURPHY WINDMILL "Discussion and possible action to approve a personal services contract with Verbij Windmill Design and Construction BV in the amount of \$206,406". Immediately following announcement of the item by the Commission secretary, the Chair commented: "...and is there anyone outside that wants to come back in and hear this wonderful decision?"¹ The Commission then

¹ See record of proceedings at time code 03.42.43.

elected not to hold public discussion or deliberation on the Verbij matter, immediately proceeded to a vote, and approved the personal services contract to Verbij.

II. Rec/Park Staff Memo re: Golden Gate Park Murphy Windmill – Award of Personal Services Contract

As you are aware, the supporting memo for the Verbij matter [Rec/Park staff, 10/7/2010] documents threats made by Verbij to refuse to perform future services for the City, and to physically withhold City owned property, absent payment of approximately \$200,000. The amount reflects monies owed Verbij, it is claimed, for work completed on the Murphy windmill project. As staff further clearly documented, Bloemendal Construction ("Bloemendal") owes the debt, and the City is in no way responsible for the payment. Despite that fact, and contrary to City guidelines, staff urged payment of Verbij and cited the need for continuing services from Verbij on the project, and the inability of either Verbij or the City to effectively pursue payment from Bloemendal, as reasons to approve the payment from the City to Verbij.

III. Basis for request of release of closed-door session transcript

From the memo and the sequence of events at the meeting, it is obvious that the Commission entered closed-door session to discuss possible litigation against Bloemendal. The Commission clearly reviewed the legal status and assets of Bloemendal (as referenced in the supporting memo) and determined that Bloemendal's bankruptcy filing, and lack of assets, eliminated any possibility of litigation or recovery of money on behalf of Verbij.

It is abundantly clear that the entry into closed door session was inappropriate and contrary to the Administrative Code. See Section 67.10. The Commission has the right to enter into closed door to discuss pending litigation, but *only* "when discussion in open session concerning these matters would likely and unavoidably prejudice the position of the City in that litigation." No argument can be made that a simple review of Bloemendal's bankruptcy status, or of assets held, would do so. The statute of limitations expired shortly after Bloemendal entered Chapter 7 bankruptcy, without the City having filed a claim against the corporation.² That the Commission met in closed-door session simply to reaffirm this fact is irrelevant.

As you know, Section 67.8.1 of the Administrative Code also unambiguously requires recordings of closed sessions, wherein the justification for the closed session is due to "anticipated litigation," be released to the public "as soon as the controversy leading to anticipated litigation is settled or concluded." The decision to approve payment to Verbij constitutes removal of the controversy, i.e., Verbij refusal to do further work or return City property. Thus, those recordings must be released.

² Section 67.8.1(a) of the Administrative Code provides that recordings of closed sessions, wherein the justification for the closed session is due to "anticipated litigation," shall be released to the public: "UPON EXPIRATION of the statute of limitations for the anticipated litigation if no litigation is filed."

Still further, the Chair's comment upon taking up the Verbij matter (see above), and the Commission decision not to hear the Verbij matter in public session, clearly indicate that the Commission discussed, deliberated and decided the Verbij matter in its entirety, all within the closed-door session. The Commission's failure to limit closed-door discussion to the anticipated litigation also violates the Administrative Code.

The harm done to the public record is compounded by the lack of discussion or deliberation of the Verbij matter within public session. That record is now unacceptably deficient, as the entire discussion and deliberation is hidden within the closed-door transcript. As such, the public cannot evaluate the Commission's deliberation of other aspects of the Verbij matter.

For each of these reasons, the Administrative Code of the City of San Francisco requires that the discussion contained within the closed door session of the October 7, 2010 meeting be made publicly available. We respectfully request that you do so immediately. Thank you for your prompt attention to the above.

Very truly yours,



Rod Divelbiss

MILMX 9.2

cc: Client



Mayor Gavin Newsom
Philip A. Ginsburg, General Manager

12/7/2010

Mr. Rod Divelbiss
235 Pine Street, Suite 1300
San Francisco, CA 94104

Re: Request for Recreation and Park Commission Closed Session Transcript and Audio/Video Recording from October 7, 2010

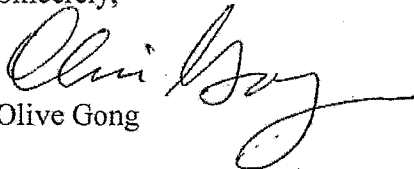
Dear Mr. Divelbiss,

This is in response to your letter of November 17, 2010, received by our office on November 19, 2010, for the recording of the Recreation and Park Commission's closed session at its October 7, 2010, meeting. We regret to inform you that the Department does not have the recording you seek. When the Commission secretary was transcribing the minutes for the October 7 meeting, she discovered that the system did not record the closed session portion of the meeting. We do not know whether system malfunction or operator error caused this lapse. The closed session lasted fifteen minutes, and as noted on the agenda, was a discussion only item to confer with legal counsel on potential anticipated litigation.

While your letter explains your assumptions as to why you think the closed session was not justified, we are not able to respond to the substance of your assertions without disclosing the communications that took place in the closed session. The attorney-client privilege protects these communications. The Department declines to waive the privilege..

If the recording had malfunctioned in open session, we would prepare a transcript from the Commission secretary's notes. In this instance, however, even if the recording existed, we would decline to produce it based on the attorney client privilege, California Government Code Section 6254(k) and California Evidence Code Section 954.

Sincerely,


Olive Gong