

Date: Feb. 22, 2011

Item No. 22 & 23
File No. 11001

SUNSHINE ORDINANCE TASK FORCE

AGENDA PACKET CONTENTS LIST*

- William Clark against the City Attorney's Office**
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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.



DENNIS J. HERRERA
City Attorney

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Deputy City Attorney

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MEMORANDUM

February 17, 2011:

WILLIAM & ROBERT CLARK VS. CITY ATTORNEY'S OFFICE (11001)

COMPLAINT

THE COMPLAINANT ALLEGES THE FOLLOWING:

Complainants William and Robert Clark allege that the City Attorney's Office ("CAO") violated section 67.21(b) of the Ordinance by failing to respond to their request for "copies of all the documents and/or records which explain exactly what the 11.75 hours of the City Attorney office personnel's [sic] time was used for regarding the "Sunshine Disclosures" for the Street Artists program during the 09-10 fiscal year[, including] a breakdown of what amount of time was used for each specific Sunshine Ordinance request your office had to spend time on and what each Sunshine Ordinance request was during the 09-10 fiscal year."

COMPLAINANT FILES COMPLAINT:

On January 11, 2011, Complainants filed a complaint with the Task Force alleging a violation of section 67.21(b).

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):

Section 67 of the San Francisco Administrative Code:

- Section 67.21 governs responses to a public records request, and the format of requests and of responsive documents.
- Section 67.26 governs withholding of records.
- Section 67.27 governs written justification for withholding of records.

Section 6250 et seq. of the Cal. Gov't Code

- Section 6253 governs the release of public records and the timing of responses.
- Section 6254(k) governs exemptions from disclosure of certain records

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- Section 6276.04 governs exemptions from disclosure of records that constitute attorney client privileged communications or attorney work product

APPLICABLE CASE LAW:

See citations in analysis below.

ISSUES TO BE DETERMINED

Uncontested/Contested Facts: The Board of Supervisors, during its budget process for fiscal year 2010/2011, adopted Ordinance 189-10, which set the fee for the Street Artist Certificate issued by the Arts Commission. Such fees are set according to the criteria of Police Code Section 2404.2, which provides that the fee "be equal to, but not greater than, the fees necessary to support the costs of administering and enforcing the provisions of the Street Artists Ordinance."

The Arts Commission submitted supporting documentation to the Board of Supervisors with Ordinance 189-10 to demonstrate the costs of administering the Street Artists Ordinance. Among the costs included in this documentation was the cost of legal advice provided by the City Attorneys' Office related to state and local public records laws. This showed that the CAO had billed the Arts Commission for 11.75 hours for legal advice related to public records requests to the Street Artists Program.

This complaint is related to Complaint 10041 against the Board of Supervisors and the Mayor's Office, Complaint 10069 against the Arts Commission, and Complaints 10061 and 11002 against the CAO.

In Complaint 10041, the Clark brothers alleged that the passing of the ordinance setting this fee violated the Sunshine Ordinance by charging a fee to provide access to public records, in violation of Sections 67.26 and 67.28(a). The Task Force found that respondents actions did not violate the above sections of the Ordinance.

In Complaint 10061, the Clark brothers alleged that the CAO violated the Sunshine Ordinance by charging a fee to provide access to public records, in violation of Sections 67.26 and 67.28(a), when it charged the Arts Commission for providing advice related to public records requests, which the Arts Commission then included in its proposed fee setting ordinance. The Task Force found there was no violation.

In Complaint 10069, the Clark brothers alleged that the Arts Commission and Howard Lazar had failed to provide public records demonstrating the salaries and benefits paid to three department employees that were included in the documentation of costs submitted by the department to the Controller to justify the fee set by the Board of Supervisors for the street artists permit. The Task Force sustained the complaint and issued an order of determination.

Complaint 11002 against the CAO is also before the Task Force for consideration at this time.

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In this specific complaint, Complainants allege that in a December 15, 2010 email to the CAO, they requested "copies of all the documents and/or records which explain exactly what the 11.75 hours of the City Attorney office personnel's [sic] time was used for regarding the "Sunshine Disclosures" for the Street Artists program during the 09-10 fiscal year[, including] a breakdown of what amount of time was used for each specific Sunshine Ordinance request your office had to spend time on and what each Sunshine Ordinance request was during the 09-10 fiscal year." Complainants do not provide the alleged December 15, 2010 email.

The CAO responded to this complaint in its January 27, 2011 email to the Task Force by denying that the CAO ever received the alleged December 15, 2010 email request for this information. The CAO also argued that this complaint is the same as Complaint 10061, previously decided by the Task Force. Complainants respond that this complaint is distinct from 10061, as that complaint alleged that the CAO was violating the Ordinance by billing the Arts Commission for advice related to public records requests.

QUESTIONS THAT MIGHT ASSIST IN DETERMINING FACTS:

- Have the Clark brothers sought the requested billing records from the Arts Commission or its agents?
- If so, what was the response? Did the Arts Commission or its agents refuse to provide the records?
- Did the Clark brothers send an email on December 15, 2010 to the CAO requesting the described billing records? If so, to whom was it addressed?
- Did the CAO respond to complainant's CAO request? If so, when was the response made and what was the response?
- Do the CAO billing records in question contain the specific information sought by the complainants?
- Did the Clark brothers request these billing records orally from the CAO representative after the January 4, 2011 meeting of the Task Force? Or was that an oral request limited to records reflecting the CAO's billing policy?
- Have the CAO records sought by complainant previously been disclosed by the Arts Commission to someone outside of an attorney client relationship? If so, to whom were they disclosed?

LEGAL ISSUES/LEGAL DETERMINATIONS:

- Assuming complainants sent to the CAO the public records request in question, has the CAO timely responded to the request under the Ordinance?
- If documents sought by the request were withheld by the CAO, did the CAO justify the withholding in writing as required by the Ordinance?
- Does the CAO's justification, if any, for withholding any responsive documents comply with the requirements of the Ordinance?

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- Do any records withheld by the CAO from disclosure constitute privileged information exempt from disclosure under the PRA and the Ordinance?
- If so, has the confidentiality of the privileged documents been partially or entirely waived under these circumstances?

SUGGESTED ANALYSIS

To the extent details of attorney billing records reveal communications between the City Attorney's Office and the client department, or the thought processes of the Deputy City Attorney Office in providing legal services to a client department, those details may be confidential under either the attorney client privilege or the attorney work product doctrine, and therefore exempt from disclosure. The legal issues involved in such a determination are discussed below.

Attorney-Client Privilege

To the extent that details of client billing records would reveal confidential communications between an attorney and her client, they are protected by the attorney-client privilege.

Section 67.27 of the Sunshine Ordinance allows for "withholding under a specific permissive exemption in the California Public Records Act, or elsewhere, which permissive exemption is not forbidden to be asserted by this ordinance, [or for] withholding on the basis that disclosure is prohibited by law, . . . [citing] the specific statutory authority." Records that contain attorney-client privileged information are protected from disclosure as a public record under Government Code §§ 6254(k) and 6276.04, and Evid. C. § 954. Gov't. Code § 6254(k) exempts from disclosure "[r]ecords, the disclosure of which is exempted or prohibited pursuant to [] state law, including, but not limited to, provisions of the Evidence Code relating to privilege." Gov't. Code § 6276.04 includes among its specifically enumerated state laws exempting records from disclosure: "Attorney-client confidential communication, Section 6068, Business and Professions Code and Sections 952, 954, 956, 956.5, 957, 958, 959, 960, 961, and 962, Evidence Code."

It is clear from these provisions that attorney-client privileged information is protected from disclosure under both the Public Records Act and the Sunshine Ordinance. In *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, the California Supreme Court held that the privilege protects from disclosure confidential communications between a city attorney and its municipal client even when not provided in connection to litigation. *City of Palmdale, supra*, 5 Cal.4th at 371. In discussing its holding, the court stated:

Open government is a constructive value in our democratic society. [] The attorney-client privilege, however, also has a strong basis in public policy and the administration of justice. The attorney-client privilege has a venerable pedigree that can be traced back 400 years. "[T]he privilege seeks to insure the 'right of every person to freely and fully confer and

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confide in one having knowledge of the law, and skilled in its practice, in order that the former may have adequate advice[.]"

. . . .

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

The attorney client privilege protects communication from an attorney to her City client. (Evid. C. § 954.) This is true even where the communication may not be written and oral statements but other means of communication. *Mitchell v. Sup. Ct (Shell Oil Co.)* (1984) 37 Cal.3d 591, 599-600. Thus, details of billing records are encompassed by the privilege.

With regard to legally privileged communications, only the client may waive or authorize another to waive the privilege. (*Rittenhouse v. Sup. Ct.* (1991) 235 Cal.App.3d 1584, 1588.) In the case of a municipal or county body, the client is the municipal or county corporate entity, acting through its constituent agents, including policy bodies. Absent such waiver by the client, the City Attorney cannot violate the attorney-client privilege by disclosing records "in connection with or supporting such advice." (See Bus. & Prof. Code § 6068(e)(1) ["It is the duty of an attorney [] [t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client."])

Attorney Work Product Doctrine

To the extent that details of client billing records would reveal the thought processes of an attorney in providing legal advice to her client, they are protected by the attorney work product doctrine.

Section 67.27 of the Sunshine Ordinance allows for "withholding under a specific permissive exemption in the California Public Records Act, or elsewhere, which permissive exemption is not forbidden to be asserted by this ordinance, [or for] withholding on the basis that disclosure is prohibited by law, . . . [citing] the specific statutory authority." Gov't. Code Section 6254(k) exempts from disclosure "[r]ecords, the disclosure of which is *exempted* [] *pursuant to* [] *state law, including, but not limited to*, provisions of the Evidence Code relating to privilege." 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 2018.030, which defines attorney work product to mean "[a] writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories[.]"

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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.

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,

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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 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. 67.26. 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

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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. 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

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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-client confidential communication, Section 6068, Business and Professions Code and Sections 952, 954, 956, 956.5, 957, 958, 959, 960, 961, and 962, Evidence Code.

...

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.



<complaints@sfgov.org>

01/11/2011 12:02 PM

To <soft@sfgov.org>

cc

bcc

Subject Sunshine Complaint

To:soft@sfgov.orgEmail:complaints@sfgov.orgDEPARTMENT:San Francisco City Attorney
CONTACTED:City Attorney Dennis Herrera

PUBLIC_RECORDS_VIOLATION:Yes

PUBLIC_MEETING_VIOLATION:No

MEETING_DATE:

SECTIONS_VIOLATED:Section 6721(b)

DESCRIPTION:On December 15, 2010 I sent the City Attorney an email in which I requested the following: "We request copies of all the documents and/or records which explain exactly what the 11.75 hours of the City Attorney Office personnal's time was used for regarding the "Sunshine Disclosures" for the Street Artist Program during the 09-10 fiscal year. We would like a breakdown of what amount of time was used for each specific Sunshine Ordinance request your office had to spend time on and what each Sunshine Ordinance request was during the 09-10 fiscal year." It has been more than 10 working days since I sent the request and I have not received any response at all from the City Attorney Dennis Herrera or his office.

HEARING:Yes

PRE-HEARING:No

DATE:January 11, 2011

NAME:William J. Clark

ADDRESS:P.O. Box 882252

CITY:San Francisco

ZIP:94188

PHONE:415-822-5465

CONTACT_EMAIL:billandbobclark@access4less.net

ANONYMOUS:

CONFIDENTIALITY_REQUESTED:No



Bill and Bob Clark
<billandbobclark@access4les
s.net>

To sotr@sfgov.org

cc

bcc

01/11/2011 12:33 PM

Subject 2 new complaints

Please respond to
Bill and Bob Clark
<billandbobclark@access4les.
net>

Hi Chris,

I want to inform you that I just filed 2 complaints against the San Francisco City Attorney Dennis Herrera and his office for violating the Sunshine Ordinance.

Please put a copy of this email in the files for both complaints.

One complaint is for a violation of Section 67.21(b) because the City Attorney and his office failed to respond to a public document request I made on December 15, 2010 within 10 working days.

The second complaint is for a violation of Section 67.21(I) because the City Attorney and his office has acted as a legal council to the custodian of public records of the Street Artist Program at the Arts Commission, Howard Lazar, for the purpose of denying the public access to public records requested pursuant to the provisions of the Sunshine Ordinance.

Here is a copy of the email I sent to the City Attorney on December 15, 2010:

City Attorney Herrera,

In a document we received from Howard Lazar, the director of the Street Artist Program, entitled "Street Artist Program FY 09-10 Charges" it lists under "City Attorney Cost for Sunshine Disclosures" that the Street Artist Program was charged \$2516.75 for 11.75 hours of the City Attorney's time during the 09-10 fiscal year.

We request copies of all the documents and/or records which explain exactly what the 11.75 hours of the City Attorney Office personnel's time was used for regarding the "Sunshine Disclosures" for the Street Artist Program during the 09-10 fiscal year.

We would like a breakdown of what amount of time was used for each specific Sunshine Ordinance request your office had to spend time on and what each Sunshine Ordinance request was during the 09-10 fiscal year.

We are requesting these documents and/or records pursuant to the provisions of the Sunshine Ordinance.

William J. Clark
Robert J. Clark

Thanks,
William J. Clark