

**SUNSHINE ORDINANCE
TASK FORCE**



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ORDER OF DETERMINATION

April 1, 2009

DATE THE DECISION ISSUED

March 24, 2009

RITA O'FLYNN v DEPARTMENT OF TECHNOLOGY (09003)

FACTS OF THE CASE

Complainant Rita O'Flynn has been investigating the federal Housing and Urban Development ("HUD") Lead Abatement Grant issued through the Mayor's Office of Housing. In 2008, Rita O'Flynn requested that she have the opportunity to review the entire HUD Lead Abatement files at the Mayor's Office of Housing. After she reviewed the files, she requested that the entire file be copied. Once she received the copies she realized that the provided records did not include the emails that she had reviewed. When she requested the email records she was advised that the emails records had been deleted since the Mayor's Office only keeps electronic records for two years. Rita O'Flynn also tried to get the email records of former supervisor Fiona Ma and the HUD office from the Board of Supervisors but learned that the electronic records had also been deleted after Supervisor Ma left the Board to join the State Assembly.

On November 14, 2008, Rita O'Flynn made an Immediate Disclosure Request ("IDR") with the Department of Technology for all emails during the past 5 years from or to:

1. Myrna Iton Melgar, Mayor's Office of Housing and Susan Suval.
2. Michael Palmer, Mayor's Office of Housing and Susan Suval.
3. Fiona Ma, San Francisco Supervisor and Myrna Iton Melgar, Mayor's Office of Housing.

On November 14, 2008, Ron Vinson, the Director of Media responded to the IDR and requested an extension under Section 67.25(b) of the Ordinance until November 25, 2008. On November 25, 2008, Ron Vinson emailed Rita O'Flynn to explain that there was difficulty in finding the records and would need more time.

On January 14, 2009, Ron Vinson emailed Rita O'Flynn and advised her that the email records that she was seeking had been deleted during the course of materials management and consistent with the Mayor's Office records retention policy. Ron Vinson stated that if records are deleted during the Mayor's Office periodic clearing of records pursuant to a stated records retention schedule, neither the Sunshine Ordinance nor the State Public Records Act requires the City to search backup tapes to retrieve such messages.

COMPLAINT FILED

On January 19, 2009, Rita O'Flynn filed a complaint against the Department of Technology Office alleging violations of Sections 67.21 and 67.29-7 of the Sunshine Ordinance.

HEARING ON THE COMPLAINT

On March 24, 2009, Complainant Rita O'Flynn appeared before the Task Force and presented her claim. Respondent Agency was represented by Ron Vinson, who presented the Department of Technology's defense.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based on the testimony and evidence presented the Task Force questioned whether the Mayor's Office of Housing should have deleted the emails after they were produced because they were responsive to an existing Sunshine request at that time. The issue had similarities to document preservation requirements that arise when a claim is made or during litigation. However, as the Mayor's Office was not a party to the complaint, the Task Force could not take any action against the Mayor's Office.

With respect to the respondent Department of Technology, however, the Task Force found that computer backup tapes are public records under both the Sunshine Ordinance and California Public Records Act. How those public records should be searched, and the cost of retrieval, however, is governed by Section 6253.9 of the California Public Records Act which allows a requestor of electronic records to be charged a fee for extraction of electronic data.

DECISION AND ORDER OF DETERMINATION

The Task Force finds that computer backup tapes are public records under the Sunshine Ordinance and the Public Records Act. The Department of Technology violated Section 67.21-1 of the Sunshine Ordinance for failure to utilize computer technology in order to reduce the cost of public records management and Section 6253.9 of the California Public Records Act for failure to respond to Ms. O'Flynn's request with an estimation of the cost to extract the records at a minimum.

The matter is referred to the Compliance and Amendments Committee to determine how the parties will proceed.

This Order of Determination was adopted by the Sunshine Ordinance Task Force on March 24, 2009, by the following vote: (Craven / Goldman)
Ayes: Craven, Knee, Cauthen, Washburn, Knoebber, Johnson, Chan, Goldman, Williams, Chu

A handwritten signature in black ink, appearing to read "Kristin M. Chu". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

Kristin Murphy Chu, Chair
Sunshine Ordinance Task Force

c: Rosa Sanchez, Deputy City Attorney
Ernie Llorente, Deputy City Attorney
Rita O'Flynn, complainant
Ron Vinson, respondent