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Via Electronic Mail

October 20, 2011

Hope Johnson, Chair
Sunshine Ordinance Task Force
1 Dr. Carlton B. Goodlett Place, Room 244
San Francisco, CA 94102-4689

RE: Ethics Complaint No. 17-100830

Dear Chair Johnson:

On August 17, 2010, the Sunshine Ordinance Task Force ("Task Force") referred Complaint No. 10018 (Ethics Complaint No. 17-100830). The Task Force referred the Department of Aging and Adult Services ("DAAS"), a division of the Human Services Agency ("HSA"), for "failure to comply with the Order of Determination in that it did not provide information related to an internal investigation of a department employee." The referral was made under section 67.30(c) of the Sunshine Ordinance.

Pursuant to section VI.D of the San Francisco Ethics Commission's Regulations for Investigations and Enforcement Proceedings, staff's recommendation was submitted to the Ethics Commission for consideration to calendar for discussion during the special meeting of the San Francisco Ethics Commission on October 19, 2011. The matter was not calendared and staff's recommendation was thus accepted.

This matter originated from a complaint that Svetlana Ptashnaya filed with the Task Force on May 17, 2010.

On February 9, 2010, Ms. Ptashnaya met with Ethelbert Ogbuehi, an Adult Protective Services ("APS") employee, in her apartment regarding her neighbor, who was an APS client. APS is part of DAAS. Ms. Ptashnaya sent a letter on February 11, 2010 to the program manager of APS, Julie Peck, about the meeting with Mr. Ogbuehi. She complained in writing about "unlawful actions and misconduct performed by your employee" and asked for the result of the investigation.

On March 5, 2010, Ms. Rasmussen responded to Ms. Ptashnaya's letter. She stated that she had "thoroughly reviewed the details of [Mr. Ogbuehi's] visit with" Ms. Ptashnaya. Ms. Rasmussen informed Ms. Ptashnaya that specific details of any APS case are strictly confidential and assured her that "this matter has now been fully investigated."

On March 15, 2010, Ms. Ptashnaya wrote to the Executive Director of HSA, Trent Rhorer. She stated that “no level of confidentiality can prevent me from knowing whether facts I mentioned in complaint were confirmed and whether actions were taken accordingly.” On March 31, 2010, Ms. Ptashnaya e-mailed Mr. Rhorer again and he forwarded her e-mail to the director of DAAS, Anne Hinton. On May 4, 2010, Ms. Hinton responded to Ms. Ptashnaya’s letter. Ms. Hinton informed Ms. Ptashnaya that the matter had already been “fully investigated” and that it was “now considered closed.” Ms. Hinton also informed Ms. Ptashnaya that “all information related to an [APS] case is highly confidential. Per State of California regulations, strict laws prevent disclosure of any aspect of the case.”

On May 17, 2010, Ms. Ptashnaya filed a complaint with the Sunshine Ordinance Task Force.

On June 22, 2010, the full Task Force heard the matter. Ms. McSpadden, the Deputy Director of DAAS, wrote to the Task Force contesting jurisdiction and stated that the “requested information is statutorily protected under the Welfare and Institutions Code, Sections 15630 and 10850.” The Task Force members decided that Ms. Ptashnaya sought “paperwork about her complaint,” which did not relate to the investigation of her neighbor. The Task Force found that the documents should have been produced, citing section 67.24(c)(7) of the Sunshine Ordinance.

On July 6, 2010, the Task Force issued an Order of Determination. The Order stated that the Task Force found that the agency violated sections 67.21(c), 67.21(e), 67.24(c)(7), and 67.27 of the Sunshine Ordinance. The Order directed the agency to “release the requested records within five business days... and [to] send a representative knowledgeable in this matter to appear before the Compliance and Amendments Committee (“CAC”) on July 13, 2010.”

On July 13, 2010, the CAC met regarding this matter. Ms. Ptashnaya was present and Ms. Rasmussen and Ms. Tebo appeared on behalf of HSA. Ms. Rasmussen stated that all documents permitted to be disclosed had been released. She stated that any other information, not already provided to Ms. Ptashnaya, was part of an APS case file that related to the investigation of abuse and protected under state law. She also stated that there was no personnel information relating to Mr. Ogbuehi in the case file. She stated that the case file involved an APS client and the work on behalf of that client. The CAC members concluded that the information pertaining to the allegation about the employee had nothing to do with the APS client and suggested that the department segregate the information about the employee from the protected APS case information. The CAC voted to refer the matter to the Task Force for possible referral to the Ethics Commission, Attorney General, Board of Supervisors, and/or District Attorney.

On July 27, 2010, the Task Force met and discussed this matter. The Task Force voted to refer the matter to the Ethics Commission for willful violation of sections 67.21(c), 67.21(e), and 67.24(c)(7).

The Ethics Commission has dismissed this matter for the reasons stated below.

The Task Force referred this matter to the Ethics Commission under section 67.30(c) of the Sunshine Ordinance. That section provides that the Task Force may make referrals to a

“municipal office with enforcement power.” Under the Sunshine Ordinance, the only power granted to the Ethics Commission is to “handle” allegations of willful violations of the Ordinance under section 67.34 by an elected official or a department head. In this case, the Task Force found that the agency, and not an elected official or department head, violated sections of the Sunshine Ordinance.

The Ethics Commission has previously determined that the Sunshine Ordinance does not provide a mechanism for the Commission to issue penalties or recommend disciplinary actions for violations of the Sunshine Ordinance referred by the Task Force under section 67.30(c). Moreover, the Sunshine Ordinance does not provide any mechanism for the Ethics Commission to compel the production of an improperly withheld public record; that power lies with the District Attorney or Attorney General.

Section 67.21(e) of the Sunshine Ordinance identifies the municipal office with “enforcement power” which the Task Force is required to notify in order to insure compliance with the Sunshine Ordinance. That office is the District Attorney. Section 67.21(e) states that upon “the determination that a 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 Task Force did not refer this matter to the appropriate municipal agency as outlined in the Sunshine Ordinance.

The Task Force referred “from the June 22, 2010, Order of Determination from the Sunshine Ordinance Task Force against the Department of Aging and Adult Services for failure to comply with the Order of Determination in that it did not provide information related to an internal investigation of a department employee.”

The Task Force found that the department did not release “documents related to employee misconduct” and based its referral on its determination that Ms. Ptashnaya’s request was “for information related to an employee’s disciplinary hearing, and documents related to it should have been released pursuant to Section 67.24(c)(7) of the Ordinance.” Section 67.24(c)(7) permits disclosure of the record of “any confirmed misconduct of a public employee” involving specific allegations and the discipline imposed for such misconduct, *where disclosure is not forbidden*.

First, disclosure of any interactions Mr. Ogbuehi had with Ms. Ptashnaya in the course of his APS investigation of elder abuse appears to be strictly prohibited under section 10850 of the Welfare and Institutions Code. While HSA department staff was unable to share specific information regarding the reason(s) why Mr. Ogbuehi met with Ms. Ptashnaya or the contents of the APS file, Ms. Tebo confirmed that Mr. Ogbuehi encountered Ms. Ptashnaya in the course of his employment and that he had been investigating an elder abuse complaint. Therefore, even if there were documents or information in the APS file (and staff has found no evidence of any) that related to “confirmed misconduct” of Mr. Ogbuehi involving one of the specific allegations referenced in section 67.24(c)(7) of the Sunshine Ordinance or discipline imposed for that

misconduct, section 10850 of the Welfare and Institutions Code likely prohibits disclosure of those records.

Second, no evidence has been presented of any confirmed misconduct or that Mr. Ogbuehi was disciplined as a result of the meeting with Ms. Ptashnaya on February 9, 2010. HSA staff confirmed that Mr. Ogbuehi met with his direct supervisor, Ms. Rasmussen, regarding Ms. Ptashnaya's complaint and both Ms. Rasmussen and Ms. Hinton decided that there was no merit to the allegations. Ms. Ptashnaya's complaint never went any further than those discussions. Ms. Tebo stated that nothing was placed in Mr. Ogbuehi's personnel file regarding Ms. Ptashnaya or this incident and that he had not been disciplined.

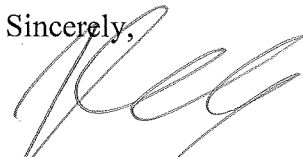
The department has repeatedly confirmed that no documents were created or exist outside or inside of the APS case file regarding the investigation of Ms. Ptashnaya's complaint. The department has also confirmed that there are no references to Mr. Ogbuehi's meeting with Ms. Ptashnaya, besides those within the APS client case file.

The Commission has no reason to believe any records of any confirmed misconduct of Mr. Ogbuehi involving personal dishonesty, misappropriation of public funds, resources or benefits, unlawful discrimination against another on the basis of status, abuse of authority, or violence exist relating to his meeting with Ms. Ptashnaya. The Commission also has no reason to believe that Mr. Ogbuehi was subjected to any discipline regarding his meeting with Ms. Ptashnaya or that any records of discipline imposed for such misconduct exist.

As no one from HSA attended the June 22, 2010 Task Force hearing, the Commission will contact Executive Director Rhorer in order to remind his department's custodian of records of the requirements in section 67.21(e) of the Sunshine Ordinance regarding the denial of a public records request.

If you have any questions regarding this matter, please call enforcement staff at (415) 252-3100.

Sincerely,



John St. Croix
Executive Director

Cc: Svetlana Ptashnaya, Complainant
Trent Rhorer, Executive Director of HSA