

SUNSHINE ORDINANCE
TASK FORCE



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August 28, 2014

The Honorable Cynthia Ming-mei Lee
Presiding Judge
Superior Court of California, County of San Francisco
400 McAllister Street, Room 008
San Francisco, CA 94102-4512

RE: Response – 2013-2014 Civil Grand Jury Report - Ethics in the City: Promise, Practice or Pretense

Dear Judge Lee:

Pursuant to California Penal Code Sections 933 and 933.5 please find listed below the Sunshine Ordinance Task Force (SOTF) response to the Civil Grand Jury Report – Ethics in the City: Promise, Practice and Pretense.

Finding 11: The role of e-mail and text messages in governmental decision-making has not been fully discussed and explored. Rules on preservation of e-mails in public records are very hazy and some departmental officials told the Jury they routinely delete e-mail. Guidance from the City Attorney on preservation of e-mail is non-specific. There is no guidance regarding text messages. There is no policy that applies to private e-mails and text messages that further public decision-making.

The SOTF partially disagrees with finding No. 11.

E-mail messages related to City business that are received or sent by City officers and employees are public records and should be retained under a Department's record retention policy and schedule approved pursuant to San Francisco Administrative Code Section 8.3, which provides, *inter alia*: "Current records and storage records less than five years old may be destroyed or otherwise disposed of if their destruction or other disposition within a shorter length of time will not be detrimental to the City and County or defeat any public purpose." (San Francisco Administrative Code Section 8.3.) The SOTF is mindful that public business may increasingly be conducted via mixed private/public e-mail accounts, and that this simultaneously raises privacy and ethical concerns as well as challenges for enforcing public records regulations as to these quasi-public accounts. Text messages may or may not be public "records"; a court case (*City of*

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San Jose v. Santa Clara County Superior Court [Smith], S218066) is now considering that issue.

There is no uniform retention requirement for e-mail communications, let alone text messages. Department heads are permitted to destroy records, provided that "the retention period applicable to them [is] set forth in a schedule for the systematic retention and destruction of records that is prepared by the department head, approved by the Mayor or the Mayor's designee, or the board or commission concerned." (San Francisco Administrative Code Section 8.3.)

As noted by the Grand Jury, guidance from the City Attorney as to both e-mail and text messages could be more clear. The SOTF may issue its own guidance to City Departments as to e-mail and text message retention and production under its power to "provide information to other City departments on appropriate ways to implement the Sunshine Ordinance" (Sunshine Ordinance Section 67.30(c).)

Recommendation 11: The Ethics Commission in conjunction with the City Attorney should develop a policy to ensure preservation of e-mails and text messages consistent with preservation of other public records. The policy, along with policies on preservation of public records, should be made available for public comment. Once it is completed and published it should be made available on City Attorney and Ethics Commission web pages that list each Department, its policy, and how to obtain documents.

The recommendation requires further analysis.

The Sunshine Ordinance Task Force, in conjunction with the City Attorney's Office and Ethics Commission, should develop policies to ensure preservation of e-mails and text messages consistent with preservation of other public records. Before adoption, these policies would be made available for public comment. The finalized policies would then be sent to all City agencies, boards, commissions, and departments and made available on the SOTF's website. Each City agency, board, commission, and department web site should include, in a similar section (i.e., "About Us" or "For More Information"), the applicable Record Retention Policy and Schedule and information about how to request public records, including contact information and forms, if applicable. The SOTF, through the Compliance and Amendments Committee and the Education, Outreach, and Training Committee, intends to review these issues in the next 6 months.

In addition, it should be noted that California Government Code Section 34090 states that the destruction of records less than two years old is not authorized. Section 8.3 of San Francisco Administrative Code, however, authorizes destruction of records in less than two years if this would not be detrimental to the City and County or defeat any public purpose. This section of the Administrative Code should be amended to comply with California Government Code Section 34090.

Finding 12: Many departments have failed to post their sources of outside funding, as required by the Sunshine Ordinance.

The SOTF agrees with finding No. 12.

Sunshine Ordinance Section 67.29-6 plainly states, “No official or employee or agent of the city shall accept, allow to be collected, or direct or influence the spending of, any money, or any goods or services worth more than one hundred dollars in aggregate, for the purpose of carrying out or assisting any City function *unless the amount and source of all such funds is disclosed as a public record and made available on the website for the department to which the funds are directed*”.

Recommendation 12: The Jury recommends that the Ethics Commission and the Sunshine Ordinance Task Force review departmental websites for compliance and notify non-compliant departments to immediately post their sources of outside funding, or face a show-cause hearing before the Ethics Commission on why the information has not been posted.

The recommendation requires further analysis.

The SOTF, through its Compliance and Amendments Committee and/or its Education, Outreach, and Training Committee, shall review the web sites of each City agency, board, commission, and department for compliance and shall develop a model for content required by Sunshine Ordinance Section 67.29-6. This said, the SOTF is mindful of its limited resources to regularly review and monitor each departmental web site for compliance with this provision alone and to notify non-compliant departments. The SOTF is also skeptical that the Ethics Commission has the power to order a show-cause hearing in the manner that the Jury recommends.

Finding 17a: There is useful information in the calendars of City Officials that should be readily available to the public.

The SOTF agrees with finding No. 17a.

Sunshine Ordinance Section 67.29-5 provides, *inter alia*, “The Mayor, The City Attorney, and every Department Head shall keep or cause to be kept a daily calendar wherein is recorded the time and place of each meeting or event attended by that official.”

Recommendation 17a: The Ethics Commission staff should collect the official calendars prepared under the Sunshine Ordinance monthly, convert them to electronic form and post them online.

The recommendation will not be implemented because it is not warranted or reasonable.

Having official calendars available at one central place or website – e.g., via the Ethics Commission’s collection of official calendars, or on a central open data API – would facilitate the public’s ability to locate those official calendars. This recommendation would shift responsibility from Department Heads to the Ethics Commission. However, there is no reason why various departments should not be responsible for making

calendars on their own websites as well. Additionally, barring possible technology and resource barriers that are presently unknown to the SOTF, the SOTF can provide static links on its own website to the public calendars of all city departments and agencies. The SOTF, through its Compliance and Amendments Committee and/or its Education, Outreach, and Training Committee, intends in the next 6 months to review departments' and agencies' compliance and urge department heads to maintain their calendars permanently and post them on their websites no later than "three business days subsequent to the calendar entry date." The Task Force will also incorporate the Sunshine Ordinance's public calendar requirements into its education and outreach materials.

Finding 17b: The Jury found calendar entries that did not meet the law's requirements, particularly in listing the meeting's subject matter and attendee names. As a result, it is not possible to crosscheck lobbyists' reports on their meetings with City officials with the calendar reports from the City officials.

The SOTF agrees with finding No. 17b.

Recommendation 17b: The City Attorney and the Ethics Commission ensure that those officials subject to the calendar requirement, and their administrative staff, be trained on the law's requirements.

The recommendation requires further analysis.

The SOTF, through its Education, Outreach, and Training Committee, assists with the annual training provided by the City Attorney under the Sunshine Ordinance. As noted above, the Task Force's Compliance and Amendments Committee and/or the Education, Outreach, and Training Committee intends in the next 6 months to review compliance with the Sunshine Ordinance's calendar requirements and to conduct a larger review of all existing Sunshine Ordinance training materials and programs, with the intent of better tailoring these training materials and programs to the audience (Elected Officials, Members of Board and Commissions, Commission Secretaries, Department Heads, Department Head Secretaries, Public Information Officers, etc.). Efforts by the City Attorney and the Ethics Commission with respect to this recommendation should be coordinated with the SOTF. Keeping with the best practices of open government, the SOTF also urges that the Board of Supervisors adhere to the public calendar requirements of other city departments and agencies.

Finding 17c: The training currently provided on Sunshine Ordinance contains no materials on the keeping of official calendars as required by the Ordinance.

The SOTF agrees with finding No. 17c.

Finding 20: Both the Ethics Commission and the Sunshine Ordinance Task Force act in good faith. They are authorized to come to similar ends - transparency in government. However, there are legal and procedural differences between their process and their legal requirements. Therefore, the results of their work are not in harmony with each other.

The SOTF partially disagrees with finding No. 20.

The SOTF refers very few matters to the Ethics Commission for enforcement. Although this reflects in part a view that not all Sunshine Ordinance violations merit referral for enforcement, it has also not fostered a greater agreement or understanding as to the appropriate burden to show or enforce a violation, willful or not. As illustrated by earlier SOTF responses, there remains ample terrain for collaboration and coordination between these separate but overlapping bodies.

Recommendation 20a: The Mayor's Office should establish a blue-ribbon committee of experts and stakeholders in open government, sunshine, and transparency, including former Sunshine Ordinance Task Force members. The Committee of Experts should review and update the Sunshine Ordinance as necessary and should report to both entities and the Board of Supervisors recommendations that would result in coordination and respect for the functions of each entity.

The recommendation requires further analysis.

The SOTF strongly encourages efforts by any office or entity to further the aims of transparent and open government. Nonetheless, whether a blue-ribbon committee is created or not, the SOTF has the power and duty to "propose to the Board of Supervisors amendments to the Sunshine Ordinance" pursuant to San Francisco Administrative Code Section 67.30(c). The SOTF, through its Compliance and Amendments Committee, intends in the next 6 months to initiate a new review of the Sunshine Ordinance to, in part: (1) identify sections of the Sunshine Ordinance which overlap and/or conflict with the rules governing the city's Ethics Commission, and (2) identify areas of the Sunshine Ordinance that should be updated to reflect new technologies implemented since its passing. Such a review should consider the views of City agencies, boards, commissions, and departments as to both policy goals and practical implementation issues; the views of "experts and stakeholders in open government, sunshine, and transparency, including former Sunshine Ordinance Task Force members;" and the views of the City Attorney and the Ethics Commission in order to foster greater harmony among those entities involved.

Recommendation 20b: For now, arrangements should be made jointly by the Ethics Commission and the Sunshine Ordinance Task Force to have complaints heard by an independent hearing officer who would develop a consistent legally sufficient record of the case for the decision of each body. This would allow the meetings of the Task Force and the Commission to focus on broader policy issues.

The recommendation requires further analysis.

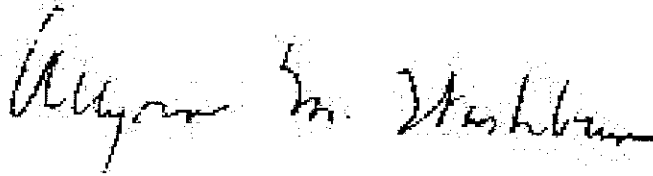
The SOTF would be interested in fully vetting a proposal to have particularly complex cases heard by an independent hearing officer in order to develop complete and legally sufficient records.

Regarding whether this recommendation is warranted at this time: The SOTF is keenly aware of the backlog in its caseload and concerted efforts are already underway to address it. In particular, the SOTF has scheduled an additional full SOTF meeting each month through the end of this year and has reinstated a complaint procedure to focus and narrow the issues in dispute. Further, the SOTF intends in the next 6 months to review and update its bylaws and complaint procedures, review due process regarding SOTF complaints and referrals, and review SOTF and Ethics Commission procedures regarding referrals. The SOTF will seek public comment on any proposed changes to the bylaws and complaint procedures.

Regarding whether the recommendation is feasible: SOTF members have raised several concerns, including how this hearing officer would be selected in order to ensure expertise and impartiality, how this hearing officer would be compensated, and how his or her independence would be assured.

The Sunshine Ordinance Task Force would like to thank the Civil Grand Jury. If there is any follow up needed, please let us know.

Sincerely,

A handwritten signature in black ink that reads "Allyson M. Washburn". The signature is written in a cursive, flowing style.

Allyson Washburn, Chair
Sunshine Ordinance Task Force

- c. Members, Board of Supervisors
- Angela Calvillo, Clerk of the Board
- Government Audit and Oversight Committee Clerk