

Date: September 23, 2008

Item No. 13
File No. 08031

SUNSHINE ORDINANCE TASK FORCE

AGENDA PACKET CONTENTS LIST*

- Order Of Determination Referral: Crossman v. Ethics Commission**
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Completed by: Frank Darby

Date: September 17, 2008

***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.

**SUNSHINE ORDINANCE
TASK FORCE**



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ORDER OF DETERMINATION

August 4, 2008

DATE THE DECISION ISSUED

July 22, 2008

KIMO CROSSMAN v. SAN FRANCISCO ETHICS COMMISSION (08031)

FACTS OF THE CASE

On May 28, 2008, Kimo Crossman made an Immediate Disclosure Request ("IDR") on-line to the San Francisco Ethics Commission. Kimo Crossman requested all communications regarding a Sunshine Ordinance Task Force referral that was sent to another body, as mentioned at a recent Board of Supervisors Rules Committee meeting by John St. Croix, Director of the Ethics Commission. On May 29, 2008, Richard Mo, Chief Enforcement Officer of the Ethics Commission and responded to the IDR a stated that the paper-only records were available for review and copying. Kimo Crossman requested that Mr. Mo have the documents scanned electronically and sent to him as an e-mail attachment. Mr. Mo replied and stated that he was under no obligation to scan records that were not originally in electronic format. He repeated his offer that Kimo Crossman could review the records in the office and/or have them copied.

COMPLAINT FILED

On June 3, 2008, Complainant Kimo Crossman filed a complaint against the Ethics Commission alleging that the Commission violated Sections 67.21-1 and 67.29-2 of the Sunshine Ordinance.

HEARING ON THE COMPLAINT

On July 22, 2008, Complainant Kimo Crossman appeared before the Task Force and presented his claim. Respondent Commission was represented by John St. Croix, who presented the Commission's defense by reading a written statement that was contemporaneously provided to the Task Force and the Complainant.

The issue in the case is whether the Commission violated Section(s) 67.1, 67.21, 67.21-1 & 67.29-2 of the Ordinance, Sections 6253.9, 6253 & 6255 of the California Public Records Act and Article I, Section 3 of the California Constitution.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The facts of this case and applicable law are similar to a previously decided case of Crossman v. SOTF Administrator (08018) in which Frank Darby refused to scan and e-mail

ORDER OF DETERMINATION

a limited number of paper documents. Consistent with the decision of that earlier case, the Task Force makes the following decision and order.

DECISION AND ORDER OF DETERMINATION

The Task Force finds that the Commission violated Section(s) 67.21-1 of the Sunshine Ordinance for failure to comply with a reasonable request to scan and email the limited number of responsive records when the Commission has the technology and feasibility to provide electronic copies and providing electronic copies, as opposed to copying paper copies which imposes a cost on the requestor, does not impose additional costs or time burdens on the Commission. The Commission shall scan and email the documents as requested within 5 business days of the issuance of this Order and appear before the Compliance and Amendments Committee on August 13, 2008.

This Order of Determination was adopted by the Sunshine Ordinance Task Force on July 22, 2008, by the following vote: (Craven / Goldman)

Ayes: Craven, Washburn, Knoebber, Chu, Goldman, Williams

Noes: Pilpel

Excused: Cauthen, Gokhale, Chan

Recused: Knee



Kristin Murphy Chu, Chair
Sunshine Ordinance Task Force

- c: Ernie Llorente, Deputy City Attorney
- Kimo Crossman
- Richard Mo, Ethics Commission
- John St. Croix, Ethics Commission



ETHICS COMMISSION CITY AND COUNTY OF SAN FRANCISCO

August 12, 2008

SUSAN J. HARRIMAN
CHAIRPERSON

EMI GUSUKUMA
VICE-CHAIRPERSON

EILEEN HANSEN
COMMISSIONER

JAMIENNE S. STUDLEY
COMMISSIONER

CHARLES L. WARD
COMMISSIONER

JOHN ST. CROIX
EXECUTIVE DIRECTOR

The Sunshine Ordinance Task Force
C/o The Board of Supervisors
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San Francisco, California 94102

Complaint #08031

Members of the Task Force:

I write to respond to the Sunshine Ordinance Task Force's ("SOTF's") Order of Determination, dated August 4, 2008.

The Order of Determination claims that the Ethics Commission has violated section 67.21-1 of the Sunshine Ordinance (S.F. Admin. Code § 67.21-1) by refusing to comply with the complainant's request to create a new electronic document, in PDF format. At the time of the complainant's request, the documents at issue existed only in hard-copy form. The Order is apparently based on the assumption that the law requires a department to create a PDF version of a hard copy document if requested to do so -- either in all circumstances, or in some circumstances not clearly defined, if defined at all, in the law. But no such legal requirement exists.

The SOTF's Order of Determination relies entirely on section 67.21-1. But, section 67.21-1 is, self-evidently, a statement of general policy. It does not establish any mandatory requirements. In particular, nowhere does it say that a department must convert a paper record into an electronic record -- a statement that would have been exceedingly easy to make, had that been the legislative intent. Indeed, one would expect an express statement to that effect had that been the legislative intent, since nowhere else in the law, either in the Public Records Act or the Sunshine Ordinance, is there such a requirement.

It is doubtful that section 67.21-1 speaks to this issue, even indirectly, and even as a matter of policy rather than law. The focus of the section is on public records that are *stored in electronic form*, not public records that exist only in paper form:

- The first sentence of subsection (a) addresses "utiliz[ing] computer technology in order to reduce the cost of public records management, including the costs of collecting, maintaining, and disclosing records"

- The second sentence of subsection (a) covers "departments that use computer systems to collect and store public records"
- Subsection (b)(1) addresses "[I]mplement[ation of] a computer system in which exempt information is segregated ... from otherwise disclosable information."
- Subsection (b)(2), the only provision of section 67.21-1 that addresses the copying of records, covers "*reproduction of electronic copies* of records in a format that is generally recognized as an industry standard format." (S.F. Admin. Code § 67.21-1(b)(2) (emphasis added).)

The absence of any language in section 67.21-1 that addresses the re-creation or re-formatting of records from paper to an electronic form, combined with the repeated references to records that already exist in electronic form, indicate that this section does not speak to the issue of creating a PDF version of a hard copy document upon request.

The SOTF's Order of Determination represents a policy judgment about what the law should be, rather than a correct statement of what the law is. Whether in some, all, or no instances departments should be required to convert paper records into PDF form is a policy question that the law does not presently answer. The SOTF's answer is an appropriate answer to a policy question – but not in the form of an Order of Determination, which indicates in response to a complaint that there has been a violation of law. Accordingly, the SOTF must reconsider its Order of Determination in this case. No violation of law has occurred in this matter and no justifiable reason exists to find otherwise.

Sincerely,

John St. Croix
Executive Director



"Kimo Crossman"
<kimo@webnetic.net>
08/12/2008 07:04 PM

<rak0408@earthlink.net>, "SOTF" <sof@sfgov.org>,
To <rak0408@earthlink.net>, "Allen Grossman"
<grossman356@mac.com>, "Kristin Murphy Chu"
"Ernest Llorente" <Ernest.Llorente@sfgov.org>, "John
cc St.Croix" <john.st.croix@sfgov.org>,
<ethics.commission@sfgov.org>, "Richard Mo"

bcc

(Ethics responds) Order of Determination: File #08031 -
Subject Crossman vs Ethics Commission - Requirement to Scan
paper to PDF

(SOTF and Ethics Clerks please make this part of the policy body files, please put a copy of this in the personnel files for Mr. St Croix and Mr. Mo and send a copy in real-time to each policy body member. Please confirm that this has been processed accordingly)

Mr. St Croix and Mr. Mo of Ethics do not acknowledge that the Sunshine taskforce is given the power to interpret the ordinance (67.30c) They are not given any such authority to second guess the taskforce. They must comply with their determination. They made their case and lost. That is the way justice works.

If there is any question about the superiority of the Sunshine Ordinance, I point parties to this provision:

SEC. 67.36. SUNSHINE ORDINANCE SUPERSEDES OTHER LOCAL LAWS.

The provisions of this Sunshine Ordinance supersede other local laws. Whenever a conflict in local law is identified, the requirement which would result in greater or more expedited public access to public information shall apply.

Additionally, nothing in the Mandated policy 67.21-1 (a) limits to electronic records only. They also ignore the broad reading of disclosure of records required in California Constitution - Prop 59 and similar findings of the Sunshine Ordinance. As discussed at the hearing and at prior hearings: copying a record (to paper or electronically), providing it in another industry standard format, scanning it or faxing do not relate to the creation of a new record.

And they ignore other provisions like 67.29-2 and 67.21-1 (b) which encourage the production of public records (not limited to electronic records) onto the internet.

Lastly the Clerk of the Board has analyzed this matter in consultation with the City Attorney and determined that the lawful response is to provide scanned to PDF paper records at no charge in the same manner that Faxing documents to requestors is also allowed.

If they continue to refuse to abide by the taskforce decision then the only appropriate response is referral for Official Misconduct to the Oakland Ethics Commission since failure to perform under Any Duty under Sunshine is such a violation 67.34.