File No. 16067 Item No. 7

SUNSHINE ORDINANCE TASK FORCE

AGENDA PACKET CONTENTS LIST

Sunshine Ordinance Task Force Date: October 5, 2016

- [X] Memorandum - Deputy City Attorney
- [X] Complaint and Supporting documents
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- [ ] Order of Determination
- [ ] Minutes
- [ ] Correspondence
- [ ] Committee Recommendation/Referral
- [ ]
- [ ]
- [ ]
- [ ] No Attachments

OTHER

- [ ] Administrator's Report
- [ ]
- [ ]
- [ ] Public Correspondence
- [ ]

Completed by: V. Young Date 09/30/16

*An asterisked item represents the cover sheet to a document that exceeds 25 pages. The complete document is in the file.

CITY AND COUNTY OF SAN FRANCISCO

DENNIS J. HERRERA
City Attorney

OFFICE OF THE CITY ATTORNEY

NICHOLAS COLLA
Deputy City Attorney

Direct Dial: (415) 554-3819
Email: nicholas.colla @sfgov.org

MEMORANDUM

TO: Sunshine Ordinance Task Force

FROM: Nicholas Colla
Deputy City Attorney

DATE: September 30, 2016

RE: Complaint No. 16067 – Petrelis v. Aaron Peskin of the San Francisco Board of Supervisors

COMPLAINT

Complainant Michael Petrelis ("Complainant") alleges that Supervisor Aaron Peskin ("Supe. Peskin") of the San Francisco Board of Supervisors ("BOS") violated provisions of Administrative Code Section 67 ("the Sunshine Ordinance") by allegedly failing to adequately respond to his Immediate Disclosure Request ("IDR").

COMPLAINANT FILES THIS COMPLAINT

On July 25, 2016, Complainant filed a complaint with the Task Force regarding the Supe. Peskin's alleged failure to adequately respond to his IDR.

JURISDICTION

Supe. Peskin is a member of the BOS, which is a policy body subject to the provisions of the Sunshine Ordinance. The Task Force therefore generally has jurisdiction to hear a complaint of a violation of the Sunshine Ordinance against Supe. Peskin. Supe. Peskin has not contested jurisdiction.

APPLICABLE STATUTORY SECTION(S)

Section 67 of the San Francisco Administrative Code:

- Section 67.21 governs responses to a public records request.
- Section 67.25 governs responses to IDRs.

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

- Section 6253 governs the release of public records and the timing of responses.

APPLICABLE CASE LAW

- ***California First Amendment Coal. v. Superior Court***, 67 Cal. App. 4th 159 (A clearly framed request which requires an agency to search an enormous volume of data for a "needle in the haystack" or, conversely, a request which compels the production of a huge volume of material may be objectionable as unduly burdensome. Records requests,

however, inevitably impose some burden on government agencies. An agency is obliged to comply so long as the record can be located with reasonable effort).

BACKGROUND

On July 20, 2016, Complainant emailed an IDR to Supe. Peskin which stated in part as follows:

> Dear Aaron "Napoleon-Complex-Politician-Who-Thinks-Nothing-of-Interrupting-Public-Comment" Peskin,
>
> This is an immediate disclosure request for copies of or access to all of your emails, regardless of topic, sent or received, through aaron.peskin@sfgov.org, and all texts sent or received from June 1 through July 20, 2016.
>
> Got questions? Send them to me via email.
>
> Please have one of your staffers confirm receipt of this IDR by the close of business on July 21, 2016.

In a response to this complaint from Supe. Peskin's Legislative Aide, Lee Hepner ("Mr. Hepner"), it was alleged that Supe. Peskin was out of the office but that his away message instructed recipients to contact Mr. Hepner.

Allegedly, Complainant did not follow up with Mr. Hepner regarding his July 20, 2016 IDR. However, Mr. Hepner was forwarded the original IDR email on July 25, 2016 and responded in part as follows:

> As for the request itself, we will not be responding to the below request, the scope of which clearly exceeds the boundaries of reasonableness. In Bruce v. Gregory (1967) 65 Cal.2d 666, the California Supreme Court articulated an elementary principle of public records law that the San Francisco Superior Court and our City Attorney have long held to apply to our City's Sunshine Ordinance. The Court articulated that principle as follows:
>
> We ... hold that the rights created by [predecessor statutes to the Public Records Act] are, by their very nature, not absolute, but are subject to an implied rule of reason. Furthermore, this inherent reasonableness limitation should enable the custodian of public records to formulate regulations necessary to protect the safety of the records against theft, mutilation or accidental damage, to prevent inspection from interfering with the orderly function of his office and its employees, and generally to avoid chaos in the record archives. Id., at 676.
>
> For the foregoing reason, we will not be responding to your records request, as it will substantially interfere with the orderly function of the Supervisor's office and his staff.

MEMORANDUM

TO: Sunshine Ordinance Task Force
DATE: September 30, 2016
PAGE: 3
RE: Complaint No. 16067 – Petrelis v. Aaron Peskin of the San Francisco Board of Supervisors

Legal Analysis

A clearly framed request which requires an agency to search an enormous volume of data for a "needle in the haystack" or, conversely, a request which compels the production of a huge volume of material may be objectionable as unduly burdensome. Records requests, however, inevitably impose some burden on government agencies. An agency is obliged to comply so long as the record can be located with reasonable effort. *California First Amendment Coal. v. Superior Court*, 67 Cal. App. 4th 159, 166.

In *California First*, the court held that a public records request for documents regarding applications to a vacant seat on a board of supervisors was neither broad nor unduly burdensome, despite the volumious review and redactions that would be necessary in order to service the request.

While there is no exact test to determine whether a public records request is unduly burdensome, the Task Force may want to consider the the amount of labor necessary to service the requests at hand and make a determination as to whether it is reasonable for Supe. Peskin to expend that amount of time doing so.

QUESTIONS THAT MIGHT ASSIST IN DETERMINING FACTS

- Could Supe. Peskin elaborate as to how his office would be burdened by responding to this IDR?
- Roughly how many emails would have been included in a response to the IDR at issue?

LEGAL ISSUES/LEGAL DETERMINATIONS

- Did Supe. Peskin violate Administrative Code Section 67.21(b), 67.25(a) and/or Government Code Section 6253(c) by failing to respond to Complainant's IDRs?
- Was the IDR so unduly burdensome that it reasonable for Supe. Peskin to decline to provide responsive records?

CONCLUSION

THE TASK FORCE FINDS THE FOLLOWING FACTS TO BE TRUE:

THE TASK FORCE FINDS THE ALLEGED VIOLATIONS TO BE **TRUE OR NOT TRUE.**

* * *

MEMORANDUM

TO: Sunshine Ordinance Task Force
DATE: September 30, 2016
PAGE: 4
RE: Complaint No. 16067 – Petrelis v. Aaron Peskin of the San Francisco Board of Supervisors

CHAPTER 67, SAN FRANCISCO ADMINISTRATIVE CODE (SUNSHINE ORDINANCE)

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, 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.

(f) The administrative remedy provided under this article shall in no way limit the availability of other administrative remedies provided to any person with respect to any officer or employee of any agency, executive office, department or board; nor shall the administrative remedy provided by this section in any way limit the availability of judicial remedies otherwise available to any person requesting a public record. If a custodian of a public record refuses or fails to comply with the request of any person for inspection or copy of a public record or with an administrative order under this section, the superior court shall have jurisdiction to order compliance.

(g) In any court proceeding pursuant to this article there shall be a presumption that the record sought is public, and the burden shall be upon the custodian to prove with specificity the exemption which applies.

(h) On at least an annual basis, and as otherwise requested by the Sunshine Ordinance Task Force, the supervisor of public records shall prepare a tally and report of every petition brought before it for access to records since the time of its last tally and report. The report shall at least identify for each petition the record or records sought, the custodian of those records, the ruling of the supervisor of public records, whether any ruling was overturned by a court and whether orders given to custodians of public records were followed. The report shall also summarize any court actions during that period regarding petitions the Supervisor has decided. At the request of the Sunshine Ordinance Task Force, the report shall also include copies of all rulings made by the supervisor of public records and all opinions issued.

(i) The San Francisco City Attorney's office shall act to protect and secure the rights of the people of San Francisco to access public information and public meetings and shall not act as legal counsel for any city employee or any person having custody of any public record for purposes of denying access to the public. The City Attorney may publish legal opinions in response to a request from any person as to whether a record or information is public. All communications with the City Attorney's Office with regard to this ordinance, including petitions, requests for opinion, and opinions shall be public records.

(j) Notwithstanding the provisions of this section, the City Attorney may defend the City or a City Employee in litigation under this ordinance that is actually filed in court to any extent required by the City Charter or California Law.

(k) Release of documentary public information, whether for inspection of the original or by providing a copy, shall be governed by the California Public Records Act (Government Code Section 6250 et seq.) in particulars not addressed by this ordinance and in accordance with the enhanced disclosure requirements provided in this ordinance.

(l) Inspection and copying of documentary public information stored in electronic form shall be made available to the person requesting the information in any form requested which is available to or easily generated by the department, its officers or employees, including disk, tape, printout or monitor at a charge no greater than the cost of the media on which it is duplicated. Inspection of documentary public information on a computer monitor need not be allowed where the information sought is necessarily and unseparably intertwined with information not subject to disclosure under this ordinance. Nothing in this section shall require a department to program or reprogram a computer to respond to a request for information or to release information where the release of that information would violate a licensing agreement or copyright law.

SEC. 67.25. IMMEDIACY OF RESPONSE

(a) Notwithstanding the 10-day period for response to a request permitted in Government Code Section 6256 and in this Article, ***a written request for information described in any category of non-exempt public information shall be satisfied no later than the close of business on the day following the day of the request. This deadline shall apply only if the words "Immediate Disclosure Request" are placed across the top of the request and on the envelope, subject line,*** or cover sheet in which the request is transmitted. Maximum deadlines provided in this article are appropriate for more extensive or demanding requests, but shall not be used to delay fulfilling a simple, routine or otherwise readily answerable request.
(b) If the voluminous nature of the information requested, its location in a remote storage facility or the need to consult with another interested department warrants an extension of 10 days as provided in Government Code Section 6456.1, the requester shall be notified as required by the close of business on the business day following the request.
(c) The person seeking the information need not state his or her reason for making the request or the use to which the information will be put, and requesters shall not be routinely asked to make such a disclosure. Where a record being requested contains information most of which is exempt from disclosure under the California Public Records Act and this article, however, the City Attorney or custodian of the record may inform the requester of the nature and extent of the non-exempt information and inquire as to the requester's purpose for seeking it, in order to suggest alternative sources for the information which may involve less redaction or to otherwise prepare a response to the request.
(d) Notwithstanding any provisions of California Law or this ordinance, in response to a request for information describing any category of non-exempt public information, when so requested, the City and County shall produce any and all responsive public records as soon as reasonably possible on an incremental or "rolling" basis such that responsive records are produced as soon as possible by the end of the same business day that they are reviewed and collected. This section is intended to prohibit the withholding of public records that are responsive to a records request

until all potentially responsive documents have been reviewed and collected. Failure to comply with this provision is a violation of this Article.

CAL. PUBLIC RECORDS ACT (GOVT. CODE §§ 6250, ET SEQ.)

SEC. 6253

(a) Public records are open to inspection at all times during the office hours of the state or local agency and every person has a right to inspect any public record, except as hereafter provided. Any reasonably segregable portion of a record shall be available for inspection by any person requesting the record after deletion of the portions that are exempted by law.

(b) ***Except with respect to public records exempt from disclosure by express provisions of law, each state or local agency, upon a request for a copy of records that reasonably describes an identifiable record or records, shall make the records promptly available to any person*** upon payment of fees covering direct costs of duplication, or a statutory fee if applicable. Upon request, an exact copy shall be provided unless impracticable to do so.

(c) Each agency, upon a request for a copy of records, shall, ***within 10 days from receipt of the request, determine whether the request, in whole or in part, seeks copies of disclosable public records in the possession of the agency and shall promptly notify the person making the request of the determination and the reasons therefor***. In unusual circumstances, the time limit prescribed in this section may be extended by written notice by the head of the agency or his or her designee to the person making the request, setting forth the reasons for the extension and the date on which a determination is expected to be dispatched. No notice shall specify a date that would result in an extension for more than 14 days. When the agency dispatches the determination, and if the agency determines that the request seeks disclosable public records, the agency shall state the estimated date and time when the records will be made available. As used in this section, "unusual circumstances" means the following, but only to the extent reasonably necessary to the proper processing of the particular request:

(1) The need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request.

(2) The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records that are demanded in a single request.

(3) The need for consultation, which shall be conducted with all practicable speed, with another agency having substantial interest in the determination of the request or among two or more components of the agency having substantial subject matter interest therein.

Sunshine Ordinance Task Force
Complaint Summary

File No. 16067

Michael Petrelis V. Supervisor Aaron Peskin, Board of Supervisors

Date filed with SOTF: 07/25/16

Contacts information (Complainant information listed first):
mpetrelis@aol.com (Complainant)
Supervisor Scott Wiener, Adam Taylor (Respondent)

File No. 16067: Complaint filed by Michael Petrelis against Supervisor Aaron Peskin, Board of Supervisors, for allegedly violating Administrative Code (Sunshine Ordinance), Section 67.25, by failing to respond to an Immediate Disclosure Request in a timely and/or complete manner.

Administrative Summary if applicable:

Complaint Attached.

Mon 7/25/2016 3:26 PM

Complaint against Peskin - Fwd: Immediate disclosure request: June/July 2016 emails, texts.

Dear Victor Young,

I wish to lodge a Sunshine Ordinance Task Force complaint against Supervisor Aaron Peskin for failure to comply with my request for public records.

I believe his staffer is incorrectly using legal opinions to withhold public records and that the SOTF members need to question Peskin and his aide regarding this denial of access to files.

Please confirm receipt of this complaint by the close of business today. Thanks.

* * * *

MPetrelis.Blogspot.com
Facebook.com/PetrelisFiles
Twitter.com/MichaelPetrelis

-----Original Message-----
From: Hepner, Lee (BOS) (BOS) <lee.hepner@SFGOV1.onmicrosoft.com>
To: mpetrelis <mpetrelis@aol.com>
Cc: Peskin, Aaron (BOS) (BOS) <aaron.peskin@sfgov.org>
Sent: Mon, Jul 25, 2016 2:55 pm
Subject: RE: Immediate disclosure request: June/July 2016 emails, texts.

Hi Michael – I received your public records request this morning. In the future, and per the instructions set forth in the auto-response on Supervisor Peskin's e-mail (did you get it?), please forward all requests pursuant to the Sunshine Ordinance or the California Public Records Act or Brown Act directly to me.

As for the request itself, we will not be responding to the below request, the scope of which clearly exceeds the boundaries of reasonableness. In *Bruce v. Gregory* (1967) 65 Cal.2d 666, the California Supreme Court articulated an elementary principle of public records law that the San Francisco Superior Court and our City Attorney have long held to apply to our City's Sunshine Ordinance. The Court articulated that principle as follows:

We … hold that the rights created by [predecessor statutes to the Public Records Act] are, by their very nature, not absolute, but are subject to an implied rule of reason. Furthermore, this inherent reasonableness limitation should enable the custodian of public records to formulate regulations necessary to protect the safety of the records against theft, mutilation or accidental

damage, to prevent inspection from interfering with the orderly function of his office and its employees, and generally to avoid chaos in the record archives. *Id.*, at 676.

For the foregoing reason, we will not be responding to your records request, as it will substantially interfere with the orderly function of the Supervisor's office and his staff.

Regards,

Lee Hepner
Legislative Aide
Supervisor Aaron Peskin
415.554.7450 office
415.554.7419 direct

From: Peskin, Aaron (BOS)
Sent: Monday, July 25, 2016 9:27 AM
To: Hepner, Lee (BOS) <lee.hepner@SFGOV1.onmicrosoft.com>
Subject: Fwd: Immediate disclosure request: June/July 2016 emails, texts.

Aaron

Begin forwarded message:
From: mpetrelis@aol.com
Date: July 25, 2016 at 9:10:07 AM PDT
To: mpetrelis@aol.com, Aaron.Peskin@sfgov.org
Subject: Re: Immediate disclosure request: June/July 2016 emails, texts.

Dear Egotistical Public Servant Peskin,

Did you receive my immediate disclosure request?

Please confirm that your office is processing the IDR today.

* * * *

MPetrelis.Blogspot.com
Facebook.com/PetrelisFiles
Twitter.com/MichaelPetrelis

-----Original Message-----
From: mpetrelis <mpetrelis@aol.com>
To: Aaron.Peskin <Aaron.Peskin@sfgov.org>
Sent: Wed, Jul 20, 2016 9:44 pm
Subject: Immediate disclosure request: June/July 2016 emails, texts.

Dear Aaron "Napoleon-Complex-Politician-Who-Thinks-Nothing-of-Interrupting-Public-Comment" Peskin,

This is an immediate disclosure request for copies of or access to all of your emails, regardless of topic, sent or received, through aaron.peskin@sfgov.org, and all texts sent or received from June 1 through July 20, 2016.

Got questions? Send them to me via email.

Please have one of your staffers confirm receipt of this IDR by the close of business on July 21, 2016.

* * * *

MPetrelis.Blogspot.com
Facebook.com/PetrelisFiles
Twitter.com/MichaelPetrelis

Member, Board of Supervisors
District 3

City and County of San Francisco

AARON PESKIN
佩斯金 市參事

September 28, 2016

Sunshine Ordinance Task Force
1 Dr. Carlton B. Goodlett Pl., Room 244
San Francisco, CA 94102-4689

Re: Complaint No. 16067 – *Michael Petrelis v. Supervisor Aaron Peskin*

Dear Chair Wolfe and Members:

This letter responds to the Complaint filed against my office by Michael Petrelis on July 25, 2016, alleging a violation of Section 67.25 of the San Francisco Administrative Code (the "Sunshine Ordinance"). The Complaint has no merit in existing law or the interpretation of that law by our City Attorney's Office. Further, and separately, it is clear from the correspondence in the record that Mr. Petrelis was motivated by a desire to harass my office and inappropriately used our City's Sunshine Ordinance as a sword to disable my office's ability to perform its function in an orderly manner.

On Monday, July 25, 2016, I received a message from Mr. Petrelis asking whether I had received his immediate disclosure request, which he had allegedly sent to my work e-mail address on July 20, 2016. In the July 20, 2016 immediate disclosure request, Mr. Petrelis requested the following:

> "This is an immediate disclosure request for copies of or access to all of your emails, regardless of topic, sent or received, through aaron.peskin@sfgov.org, and all texts sent or received from June 1 through July 20, 2016."

See Exhibit 1 (E-mail correspondence, dated July 20 through July 25, 2016). At the time of Mr. Petrelis' request, I had an auto-response message set on my Outlook e-mail client which acknowledged the large amount of correspondence that I receive on a daily basis and encouraged members of the public to direct all public records request to my staff, Lee Hepner. Regardless, Mr. Petrelis did not direct his request toward Mr. Hepner, and I personally forwarded Mr. Petrelis' immediate disclosure request to my staff on Monday, July 25, 2016. *Id.*

City Hall • 1 Dr. Carlton B. Goodlett Place • Room P-231 San Francisco, California 94102-4689 • (415) 554-7450
Fax (415) 554-7454 • TDD/TTY (415) 554-5227 • E-mail: Aaron.Peskin@sfgov.org

Mr. Hepner responded to Mr. Petrelis' request on the same day that he received it and, with my approval and based on the advice of our City Attorney's Office, invoked the rule of reason. *Exh. 1*. My staff articulated the principle, which appears in the City's Good Government Guide and quoted the California Supreme Court's long-standing opinion in *Bruce v. Gregory*:

> "We... hold that **the rights created by [predecessor statutes to the Public Records Act] are, by their very nature, not absolute, but are subject to an implied rule of reason.** Furthermore, this inherent reasonableness limitation should enable the custodian of public records to formulate regulations necessary to protect the safety of the records against theft, mutilation or accidental damage, **to prevent inspection from interfering with the orderly function of his office and its employees**, and generally to avoid chaos in the record archives." *Exh. 1; see also Bruce v. Gregory* (1967) 65 Cal.2d 666 [emphasis added.]

The City Attorney has argued, and courts have long upheld, that these reasonableness limitations apply both to the California Public Records Act as well as to the Sunshine Ordinance. *See Exhibit 2* (September 19, 2006 Memorandum); *see also Western Select Securities, Inc. v. Murphy, et al.*, S.F. Superior Court No. 312310 (holding, in pertinent part, that public records laws are subject to an implied or inherent rule of reason.)

Within 30 minutes of receiving the e-mail from my staff invoking the rule of reason, Mr. Petrelis lodged a complaint against my office with the Sunshine Ordinance Task Force, alleging a violation of San Francisco Administrative Code Section 67.25.

Based on the advice of our City Attorney and on the foregoing authority, I believe my office was more than justified in rejecting Mr. Petrelis' sweeping request for records. Responding to a request would constitute an enormous diversion of resources from my office's daily work of serving the public. For the sake of providing some additional context, I receive hundreds of e-mails per day on innumerable topics. The time that it would take for my office to compile nearly two months of these records, which would also include the necessary time it would take to scan each and every message for private redactable information, transcends the bounds of reason.

Separate and apart from the foregoing justification of my office's response to Mr. Petrelis' request, it is transparent from the record that Mr. Petrelis' sole intent was to interfere with the orderly function of my office and, in doing so, to bully and harass my District 3 office. Mere hours before he sent his original request for records on July 20, 2016, Mr. Petrelis provided public comment at a meeting of the Democratic County Central Committee, of which I am a member. At the outset of Mr. Petrelis' public comment at that tribunal, I momentarily interjected to suggest that Mr. Petrelis address his comments to the members of the body instead of at the

audience, if only because it is difficult for members of the body to hear when comments are being made in the opposite direction of a vast echoing chamber.[1] To be clear, I did not express disagreement with the content of Mr. Petrelis' speech nor was I attempting to curtail his speech in any way. Nevertheless, not more than three hours later on that same evening, Mr. Petrelis issued his broad records request, referring to me as "Dear Aaron 'Napoleon-Complex-Politician-Who-Thinks-Nothing-of-Interrupting-Public-Comment' Peskin." *Exh. 1.* In his follow-up e-mail, he addresses me as "Dear Egotistical Public Servant Peskin." *Id.* I challenge anyone to watch the video of this incident and similarly conclude that I was behaving in any manner to curtail or cut short Mr. Petrelis' public comment.

My office's response to Mr. Petrelis' request is justified and clearly founded in applicable case law and our City's interpretation of the Sunshine Ordinance. The additional information related to Mr. Petrelis' motivation underscores his clear and sole intent to "interfere with the orderly function" of my office and my staff. *Bruce v. Gregory, supra.*

For the foregoing reasons, I respectfully request that the Sunshine Ordinance Task Force reject Mr. Petrelis' Complaint.

Respectfully,

Aaron Peskin

Cc: Michael Petrelis, Complainant
Victor Young, Clerk

[1] A video of this incident is publicly available at Mr. Petrelis' blog at the following link: http://mpetrelis.blogspot.com/2016/07/open-govt-foe-sup.html

Mon 7/25/2016 3:26 PM

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I believe his staffer is incorrectly using legal opinions to withhold public records and that the SOTF members need to question Peskin and his aide regarding this denial of access to files.

Please confirm receipt of this complaint by the close of business today. Thanks.

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Regards,

Lee Hepner
Legislative Aide
Supervisor Aaron Peskin
415.554.7450 office
415.554.7419 direct

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Aaron

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Date: July 25, 2016 at 9:10:07 AM PDT
To: mpetrelis@aol.com, Aaron.Peskin@sfgov.org
Subject: Re: Immediate disclosure request: June/July 2016 emails, texts.

Dear Egotistical Public Servant Peskin,

Did you receive my immediate disclosure request?

Please confirm that your office is processing the IDR today.

* * * *

MPetrelis.Blogspot.com
Facebook.com/PetrelisFiles
Twitter.com/MichaelPetrelis

-----Original Message-----
From: mpetrelis <mpetrelis@aol.com>
To: Aaron.Peskin <Aaron.Peskin@sfgov.org>
Sent: Wed, Jul 20, 2016 9:44 pm
Subject: Immediate disclosure request: June/July 2016 emails, texts.

Dear Aaron "Napoleon-Complex-Politician-Who-Thinks-Nothing-of-Interrupting-Public-Comment" Peskin,

This is an immediate disclosure request for copies of or access to all of your emails, regardless of topic, sent or received, through aaron.peskin@sfgov.org, and all texts sent or received from June 1 through July 20, 2016.

Got questions? Send them to me via email.

Please have one of your staffers confirm receipt of this IDR by the close of business on July 21, 2016.

* * * *

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EXHIBIT 2

CITY AND COUNTY OF SAN FRANCISCO

DENNIS J. HERRERA
City Attorney

OFFICE OF THE CITY ATTORNEY

PAUL ZAREFSKY
Deputy City Attorney

DIRECT DIAL: (415) 554-4652
E-MAIL: paul.zarefsky@sfgov.org

MEMORANDUM

TO: Honorable Members
Sunshine Ordinance Task Force

FROM: Paul Zarefsky
Deputy City Attorney

DATE: September 19, 2006

RE: Providing Electronic Records In PDF Rather Than Word Format When Responding To A Public Records Request

This Office has orally advised City departments that, in response to a public records request for an electronic copy of a record, a City department may provide the record to the requester in PDF[1] rather than Word format. In this memorandum, we address the legal principles supporting this conclusion. The issue potentially affects all City departments, because all departments maintain electronic records. The volume of such records is huge, and we expect that the issue will arise in future public records requests for electronic records.

We address this issue from two perspectives – (1) protecting "metadata" hidden in the electronic record and (2) protecting the text of the electronic record. This memorandum does not address any complaint before the Task Force. Rather, we intend to provide general advice on this issue.

Protecting Metadata Hidden In The Electronic Record

A Word document – unlike an electronic record in PDF format – contains "metadata." This term generally refers to information about an electronic record that does not appear in the text but is automatically generated by the program when a text is created, viewed, copied, edited, printed, stored, or transmitted using a computer. The metadata are typically embedded in the record in a manner not readily viewed or understood by persons without specialized computer training, that enables one to locate information that is not shown in the text. We use the term "metadata" broadly to include any information embedded in the record that is not visible in the text.

The metadata may include a wide variety of information that the City has a right – and, in some cases, a legal duty – to withhold from public view. For example, earlier versions of an electronic record are present in metadata and often will include recommendations of the author of a draft, which the Sunshine Ordinance allows the City to withhold from disclosure. (S.F.

[1] The term "PDF" is an abbreviation for Portable Document Format. As the term suggests, a PDF record functions as a "portable" document in that it may be transmitted electronically as a whole document and viewed and read on a computer screen. A scanned PDF record essentially is a picture of a document that may be viewed and read on a computer screen. A searchable PDF record permits the viewer/reader to search the document for specific words or phrases and to cut and paste from the document. Neither type of PDF record contains metadata embedded in the record.

Admin. Code §67.24(a)(1).) Such passages could include edits that are part of the author's thought process and were never intended to be communicated to another person. As a second example, earlier versions of an electronic record that are present in metadata may include information the disclosure of which would violate a third party's privacy – a right the law zealously safeguards. (Cal. Gov. Code §§ 6250, 6254(c); S.F. Admin. Code §67.1(g); Cal. Const., Art. I, sec. 1.) A wide range of types of information may be encompassed within the right of privacy; everything from residential phone numbers and Social Security numbers to sensitive medical, financial, and sexual data to information provided by, and the identity of, whistleblowers. As a third example, metadata may include communications between attorney and client that do not appear in the text of the record. The law protects confidential attorney-client communications from disclosure. (Cal. Evid. Code §954.) These examples are merely illustrative of the broader point that metadata may contain information specifically subject to redaction under the Public Records Act and the Sunshine Ordinance.

If a department were to give a requester a document in Word format, the department would be required to review the metadata embedded in the document. Failure to conduct this review would risk disclosure of privileged material. Yet reviewing the metadata would be a laborious, burdensome, and problematic task – different in nature and magnitude from the process of reviewing the text to determine information that should be redacted and information that is reasonably segregable from that which should be redacted. Electronic records may be adapted from any number of earlier texts – which would themselves contain metadata – and may have been subject to numerous edits. Information recorded in the process of creating and editing the text of such a document may be unknown to the author, the sender, and/or the recipient. The investigation necessary to determine whether redactions in metadata are legally warranted would in many cases be daunting. Merely identifying and interpreting certain of the metadata would require considerable expertise beyond the skill and capacity of all but a small number of City employees. And there is considerable risk that even those with the expertise would not locate all the metadata.

In addition, the metadata embedded in a Word document could reveal sensitive information about the operation of the City's computer and communications system that could be used by a third party to undermine the integrity and security of that system. For example, the disclosure of such information as unique identifiers for individual computer terminals and computer servers, and the location of information in a department's computer system, could compromise the integrity and security of the system. We do not understand that disclosure of metadata alone would in itself permit an unscrupulous individual to "hack" into the City's computer system. But should such an individual find his or her way into the City's system, knowledge about metadata gleaned from a Word document made available to the public could make it easier for that person to navigate his or her way through the system, locate sensitive files, alter or delete documents, and generally undermine the security of records within the system.

In making decisions about disclosure of public records, the City may not inquire as to a requester's purpose, or the use the requester may make of the information obtained. (Cal Gov. Code §6257.5; S.F. Admin. Code §67.25(c).) Requests from prudent, civic-minded persons must be treated the same as requests from reckless or ill-motivated persons. Further, disclosure of a record to one member of the public generally precludes the City from withholding that record from another member of the public. (Cal. Gov. Code §6254.5.) Thus, even if the City is certain that a particular requester has a legitimate purpose and would not misuse – or even review –

information contained in the metadata of a requested record, the City does not have the luxury of indulging benign assumptions about requesters when determining its response to a public records request for an electronic record in Word format.

These problems must be understood not from the vantage point of one isolated electronic record that may be the subject of a Task Force hearing. City government is comprised of scores of departments and even more boards, commissions, and advisory bodies, and there are literally millions of electronic records within the City's files, that have been created, edited, transmitted, or received by a workforce of approximately 25,000 to 30,000 employees. The staff resources of the City – technical, professional, and clerical – that may be devoted to responding to public records requests are limited.

If the City is required to disclose documents in Word format in response to a public records request, there could be a significant adverse impact on the conduct of City business – both everyday public business, and the business of responding to public records requests. The City has no control over the number and scope of public records requests it receives, or the number and scope of requests filed by a single person or small group of persons. The added burden of having to review metadata in electronic records could be crippling if the City is required to provide electronic records to requesters in Word rather than PDF format.

The City's duty to respond to a public records request is limited by a rule of reason. It has long been understood that public records laws do not impose absolute requirements on public entities. Rather, the efforts required to respond to a public records request are inherently bounded by a standard of reasonableness. In *Bruce v. Gregory* (1967) 65 Cal.2d 666, the California Supreme Court articulated this elementary principle of public records law:

> We ... hold that the rights created by [predecessor statutes to the Public Records Act] are, by their very nature, not absolute, but are subject to an implied rule of reason. Furthermore, this inherent reasonableness limitation should enable the custodian of public records to formulate regulations necessary to protect the safety of the records against theft, mutilation or accidental damage, to prevent inspection from interfering with the orderly function of his office and its employees, and generally to avoid chaos in the record archives.

Id. at 676. Both the California courts and the California Attorney General have extended *Bruce's* implied rule of reason to public records requests under the Public Records Act. (*Rosenthal v. Hansen* (1973) 34 Cal.App.3d 754, 761; 64 Ops.Cal.Atty.Gen. 186, 189-91 (1981) [Op. No. 80-1106]; 64 Ops.Cal.Atty.Gen. 317, 321 (1981) [Op. No. 80-1006]; 76 Ops.Cal.Atty. Gen. 235, 241 (1993) [Op. No. 93-702].)

There is no indication that the Board of Supervisors, in adopting the Sunshine Ordinance in 1993, or the voters, in amending the Ordinance in 1999, intended to jettison this longstanding principle of public records law. Indeed, in the context of assessing under both the Public Records Act and the Sunshine Ordinance the reasonableness of a search for records, the San Francisco Superior Court has ruled that the same reasonableness limitations applicable to the Act apply as well to the Ordinance.[2]

[2] *Western Select Securities, Inc. v. Murphy, et al.*, S.F. Superior Court No. 312310, Slip Op. at 5-6 (copy attached; stamped August 24, 2000, issued December 1, 2000). This ruling was

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In addition, Section 67.21-1(a) of the Sunshine Ordinance states that "[I]t is the policy of the City and County of San Francisco to utilize computer technology *in order to reduce the costs of public records management, including the costs of* collecting, maintaining, and *disclosing* records subject to disclosure to members of the public under this section." (S.F. Admin. Code §67.21-1(a) [emphasis added].)[3]

A court would likely conclude that these principles of reasonableness and cost containment that govern disclosure of public records under the Public Records Act and the Sunshine Ordinance permit the City to decline to provide to a requester metadata that is embedded in an electronic record such as a Word document. To require departments to disclose electronic records in Word format would necessitate their exhaustively searching and reviewing metadata in those records before finalizing a response to the requester. This process would entail considerable cost to the City, given the technical expertise and staff resources that would have to be devoted to it. Imposing this process on the City would contradict the City's own policy of using computer technology to reduce the costs incurred in disclosing public records.

Protecting The Text Of The Electronic Record

The text of a Word document may be easily edited or otherwise altered by the requester or by persons to whom the requester makes the document available. The alteration would not be obvious or readily discernible to the average person or even in many cases to someone generally familiar with the document. As a result, providing a record in Word format to a requester jeopardizes the integrity of the record. That format makes it easy for the requester or others to change the record and then present the altered record as the original. Apart from any such questionable purpose, if the City provides a record in Word format and the requester or others edit or otherwise alter the record, there is the potential for creating confusion, even inadvertently, as to whether the original record or the altered version is the true public record.

The Public Records Act allows public entities to address these concerns in making records available to the public. Section 6253.9 of the Act addresses information in an electronic format. (Cal. Gov. Code §6253.9.) Subsection (f) states: "Nothing in this section shall be construed to require the public agency to release an electronic record in the electronic form in which it is held by the agency if its release would jeopardize or compromise the security or integrity of the original record or of any proprietary software in which it is maintained." (Cal. Gov. Code §6253.9(f).) Disclosure of a record in Word format could jeopardize the integrity of

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not disturbed on appeal. *See Western Select Securities , Inc. v. Superior Court*, Court of Appeal, First District, Case No. A093500, May 3, 2001 (order denying petition for writ of mandate). While a trial court opinion generally may not be cited as precedent in a judicial proceeding (*see* Cal. Rule of Court 977), this trial court opinion nonetheless may shed light on whether a court would be receptive to the point that the Sunshine Ordinance carries forward the principle, recognized both pre- and post-Public Records Act, that public records laws are subject to an implied or inherent rule of reason.

[3] In addition, we note that the Sunshine Ordinance endorses "[I]mplementing a system that permits 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].) It is our understanding that PDF versions of electronic records are generally recognized as an "industry standard format" for providing copies of electronic records.

Memorandum

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the record because the text is so easily manipulated. Subsection (f) thus gives City departments discretion to choose to provide the record to a requester in other more secure formats, and nothing in the Sunshine Ordinance changes this result.

We recognize that computer-savvy experts using sophisticated technological aids are able to tamper with electronic records in some formats other than Word. But this possibility does not change the legal analysis. Subsection (f) permits a department to provide an electronic record to a member of the public in a format less susceptible to textual manipulation than the format requested. A Word document is much more susceptible to textual manipulation, as compared, for example, to a record in scanned PDF format. So long as the integrity of the record is jeopardized by making it available in Word format, Subsection (f) permits the City to provide it in another format.

Conclusion

A court would likely conclude that a City department has discretion under both the Public Records Act and the Sunshine Ordinance to provide an electronic record to a public records requester in PDF rather than Word format.[4]

* * * * *

We hope this memorandum proves useful to the Task Force in its analysis and discussion of an important issue. If there are any questions or concerns on the general issue, divorced from the particulars of any specific case, please feel free to contact this office.

P.Z.

[4] This memorandum does not address the power of a court in a litigation context to order or limit access of a party to another party's electronic records.