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April 18, 2013

Andrea Ausberry  
Task Force Administrator  
Sunshine Ordinance Task Force  
City Hall, Room 244  
1 Dr. Carlton B. Goodlett Place  
San Francisco, CA 94102-4689  
**Notice**

**Re: Amended Complaint Regarding Improper Agenda**

Dear Ms. Ausberry,

Complaint against which Department or Commission:

- Public Health Commission

Name of individual(s) **responsible** at Department or Commission

- **Sonia Melara, President, Health Commission**
- **Barbara Garcia, Director of Public Health**
- **Mivic Hirose, CEO, Laguna Honda Hospital**
- **Full Health Commission**

Alleged Violation:  Public Records Access  Public Meeting  
Sunshine Ordinance Section(s) §67.7(a), §67.7(b), and §67.9(a)

Do you want a public hearing before the Sunshine Ordinance Task Force?  Yes  No  
 Do you want a pre-hearing conference before the Complaint Committee?  Yes  No  
 I request confidentiality of my personal information  Yes  No

**Please describe alleged violation.**

**Note:** The SOTF’s Administrator, Andrea Ausberry, wrongly advised the Complainants in this case that §67.21(b) of the Sunshine Ordinance provides an avenue for “mediation” in her misguided attempt to “stave off a formal [SOTF] hearing.” But §67.21(b) applies to mediating disputes about whether public records are disclosable, and the mediation is intended to determine whether the records are public records. Further, §67.21(b) is contained in Chapter 3 of the Sunshine Ordinance dealing with disputes over access to records; but this complaint involves issues covered under Chapter 2, dealing with access to (and notification of) public meetings, so §67.21(b) is inapplicable.

**1. Issue of This Complaint:** The principal issue in this complaint involves agenda item descriptions. Both the Sunshine Ordinance and the Brown Act require providing meaningful agenda item *descriptions* so as to alert members of the public of actions being taken by policy bodies in order to determine whether members of the public may choose to attend a given meeting. When an agenda item contains a defective description, members of the public are denied an opportunity to decide whether to attend a given meeting.

The word “description” is defined as “a statement, or a picture in words, that describes details of certain or salient aspects, characteristics, or features of a given subject matter.” Alternatively, a “title” or “subheading” is defined as “a title or heading of a subdivision.”

Neither the Brown Act nor the Sunshine Ordinance provide for the substitution of a “description” of an agenda item using a mere subheading, in part because a subheading does not convey sufficient or *meaningful* information for a member of the public to decide whether to attend a given meeting of a policy body. This is a “material” error, per the City Attorney’s *Good Government Guide*.

**2. Respondent Identification**

a) Both Health Commission President Sonia Melara and Director of Public Health Barbara Garcia are named by position title in the Health Commission’s By-laws *as responsible for setting the agendas* for Health Commission

Meetings (page 5, Health Commission By-Laws, as amended January 17, 2012, contained as an attachment to the City and County of San Francisco's "*Defendants' Reply Brief in Support of Motion for Summary Judgment*" in the case of *Derek Kerr, MD, vs. the City and County of San Francisco*). Melara and Garcia are required to take Sunshine Ordinance training annually, and should know of Sunshine Ordinance agenda requirements.

- b) Mivic Hirose, as the Executive Administrator/CEO of Laguna Honda Hospital, also should have known from her annual Sunshine Ordinance training, that she is not permitted to lump multiple agenda items together, lacking any description whatsoever, into a single report (see discussion of the "LHH Update" item in paragraph 5, below).
- c) Each member of the Health Commissioner should have known that their meeting agenda was defective prior to the start of the Health Commission's April 2, 2013 meeting, since they, too, are required to take annual Sunshine Ordinance training. None of the Health Commissioners objected to the clearly deficient agenda description for Agenda Item #7.

### 3. Description

As part of the non-monetary settlement terms of Dr. Derek Kerr's \$750,000 wrongful termination award, the Health Commission was required to schedule a public hearing at which Laguna Honda Hospital's CEO Mivic Hirose was to publically apologize to Dr. Kerr. When the Health Commission scheduled the apology for April 2, 2013, it violated the Sunshine Ordinance requiring noticing members of the public, and its agenda was deficient — in violation of the Sunshine Ordinance — for a number of reasons:

- a. **Violation of §67.7(a):** §67.7(a) clearly states that "a policy body shall post an agenda *containing a meaningful description of each item of business* to be transacted or discussed at the meeting ..." (emphasis added).
  - 1) As shown on Enclosure 1 to this complaint, the agenda item for Dr. Kerr's public apology contained no description at all, let alone a meaningful description; indeed the agenda listed only the title of the agenda item, and *completely elided (omitted) any description whatsoever*.
  - 2) Rather than providing separate descriptions for **each item of business**, the Health Commission lumped several separate items concerning LHH into a single agenda item, without describing *any* of the separate items "embedded" in the single item.
- b. **First Violation of §67.7(b):** §67.7(b) clearly states:

(b) A description *is meaningful if it is sufficiently clear and specific* to alert a person of average intelligence and education whose interests are affected by the item that he or she may have reason to attend the meeting or seek more information on the item. *The description should be brief, concise and written in plain, easily understood English* [emphasis added].

Again, as shown on Enclosure 1, the agenda item contained *no description at all* — let alone a concise, meaningful, clear, or specific description — and listed, instead, only the title of the agenda item.

- c. **Second Violation of §67.7(b):** §67.7(b) clearly also states:

(b) ... [The agenda] *shall refer to any explanatory documents* that have been provided to the policy body in connection with an agenda item, such as correspondence or reports, *and such documents shall be posted adjacent to the agenda* ... [emphasis added].

Again, as shown on Enclosure 1, the agenda item *did not refer to any explanatory documents* by explicitly referring to the "LHH Update" document provided to the Health Commissioners. As will be discussed further in this complaint, there was no way that members of the public could have possibly learned from the agenda, that the agenda item would actually involve the public apology to Dr. Kerr, or that Mivic Hirose, CEO of LHH, would be presenting a recognition of Dr. Kerr.

d. **Violation of §67.9(a):** §67.9(a) clearly states:

(a) Agendas of meetings and *any other documents on file* with the clerk of the policy body, when intended for distribution to all, or a majority of all, of the members of a policy body *in connection with a matter anticipated for discussion or consideration* at a public meeting shall be made available to the public [emphasis added].

The agenda that was e-mailed to those who are on DPH’s “interested persons” list — including to the two complainants filing this Sunshine Complaint — who have requested that agendas be e-mailed to them prior to meetings, received only the agenda item itself, and the minutes of the previous month’s meeting minutes; *the e-mailed agenda did not attach or even refer to the “LHH Update” document* “adjacent to” other attachments in the e-mail notice — which document *may* have alerted members of the public that Dr. Kerr’s public apology would occur at the Health Commission’s April 2 meeting, and that they may have wanted to attend the meeting.

**4. Additional Discussion**

In addition to the descriptions of various violations noted above, there’s more:

a) **Agenda Did Not Use Standard Hypertext Markup Language Formatting to Provide a Visible Hyperlink.**

As shown on Enclosure 1, Agenda Item 7, titled “LHH Update” simply used underling for the agenda item title (in addition to failing to provide a meaningful description). In both the print version e-mailed as an attachment to interested persons prior to the meeting, and in the on-line version posted on the Health Commission’s web site, there was no visible clue that the title was, in fact, a covert hyperlink that would take people to the “LHH Update” document. In fact, neither the agenda e-mailed to DPH’s “interested persons list” prior to the meeting, nor the version of the agenda now available on the Health Commission’s web site, provided a hyperlink to the background document most likely provided to the Health Commissioners prior to the meeting.

b) **Agenda Did Not Provide Instructions that Agenda Item Titles May Have Been Working Hyperlinks to Background Materials**

There is no indication anywhere on the agenda that the agenda item titles may have been active hyperlinks to another document, and there are no instructions anywhere in the agenda advising readers to click on agenda item titles to take them to background materials hyperlinked to an agenda item’s title. Inadvertently, Dr. Rivero clicked on the title of Agenda Item #7 on the agenda posted on DPH’s web site (see Enclosure 2) over the weekend of March 29–30, and was shocked to discover that it took her to a second document (“LHH Update”) announcing that Mivic Hirose would be presenting Dr. Kerr with his recognition and public apology. Had Rivero *not* inadvertently clicked on the title of Agenda Item #7, she and Kerr would not have known that Kerr would receive recognition two days later on April 2. How many other people didn’t learn of it, given the lack of a visible hyperlink?

c) **Ignoring City Attorney’s “Good Government Guide**

According to the *Good Government Guide* issued by San Francisco’s City Attorney — which document contains many erroneous interpretations of the Sunshine Ordinance — it nonetheless stipulates that:

“Sometimes it is best for an agenda description of an item to *highlight specific components of an issue* that are expected to be the main focus of discussion and action [on an agenda item]” [emphasis added]. [*Good Government Guide*, Part 3.IV.D.1, page 116]

In addition the *Good Government Guide* notes that when a “material” error is made misstating the substance of an agenda item, it may adversely affect the decisions of interested persons who may have wanted to attend a meeting, except for errors in the agenda:

“Occasionally, the description of an agenda item contains an error. *If the error is material, the general rule is that the policy body must continue the item without taking any action.* Whether an error is material depends on the facts and circumstances. It may be *material if it substantially misstates the substance of the agenda item so that potentially interested members of the public might have attended the meeting or sought further information about the item had it not contained the error*” [emphasis added]. [*Good Government Guide*, Part 3.IV.D.1, page 117]

Since the agenda for Item 7 only contained a subheading, and no description of it whatsoever, the agenda was clearly deficient. Therefore, the Health Commission should have continued this item to its next meeting so people interested in attending would have known what this agenda item was actually all about.

The *Good Government Guide* stipulates that agenda’s must refer to explanatory documents, which the Health Commission’s April 2 did NOT do:

“The agenda *must refer to explanatory documents*, such as correspondence or reports that the policy body has received in connection with an agenda item. The clerk of the body must post these documents adjacent to the agenda *if they are one page in length*” [emphasis added]. [*Good Government Guide*, Part 3.IV.D.2, page 117]

The “LHH Update” document, enclosed for the Sunshine Ordinance Task Force’s review was, in fact, a one-page document that was not made readily available to members of the public prior to the meeting.

**d) Brown Act Violation**

The Brown Act also requires meaningful agenda item descriptions. The Brown Act’s Chapter IV, *Notice and Agenda Requirements*, stipulates in paragraph IV.1.A that agendas “must ... contain a brief general description of each item to be discussed” ... and further stipulates ... “The purpose of the brief general description is to inform interested members of the public about the subject matter under consideration so that they can determine whether to monitor or participate in the meeting of the [policy] body.”

Clearly, the Health Commission’s agenda for April 2 did not contain any description whatsoever for Item #7, “LHH Update,” in flagrant violation of the Brown Act.

**5. “LHH Update” Item**

In addition to the fact that the one-page “LHH Update” was not made available to members of the public via DPH’s interested persons e-mail list as an e-mail attachment in advance of the meeting in violation of paragraph 3.IV.D.2 of the *Good Government Guide*, the “LHH Update” clearly violated the Sunshine Ordinance, and possibly Dr. Kerr’s settlement agreement against the City, in a number of ways. As noted above in paragraph 3a(2) on page 2 above, the LHH Update lumped routine updates about LHH’s operational activities and Dr. Kerr’s legal settlement agreement into a single agenda item.

The latter — Kerr’s settlement agreement — had nothing to do with routine operations of Laguna Honda Hospital. As such — and because it involved a legal settlement against the City — Kerr’s item should have been listed as a separate agenda item per Sunshine Ordinance §67.7(a) that requires each item of business to be discussed on the agenda to have separate meaningful agenda descriptions for each item.

**6. Pattern of Repeated Agenda Item Description Violations**

The Health Commission has a long, past-practice history of providing only agenda titles, without any meaningful descriptions of agenda items. For instance, recent agenda deficiencies include:

Meeting Date	Item #	Item Subheading	Meaningful Description
March 19, 2013	7	Health Commission Elections	No description at all; didn’t specify what the elections were for.
March 19, 2013	9	Population Health and Prevention Reorganization Plan	No description at all, and did not describe what possible action the Health Commission would be considering.

April 18, 2013

**Re: Amended Complaint Regarding Improper Agenda Notice**

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Meeting Date	Item #	Item Subheading	Meaningful Description
March 5, 2013	8	Health Commission Meeting Records	No description at all, did not describe what possible action the Health Commission would be considering.
February 19, 2013	7	Community Independence Pilot Project; Resolution	No description at all, and did not describe the Resolution being proposed, and did not e-mail the proposed Resolution to DPH's Interested persons list as an e-mail attachment.

There are many other such examples going back in time for years and years showing a pattern of clear violation of the Sunshine Ordinance's requirements for meaningful agenda descriptions.

**7. Remedies Sought**

It is clear that Health Commission president Sonia Melara, Director of Public Health Barbara Garcia, and LHH's Executive Administrator Mivic Hirose, may have **each** deliberately issued a defective agenda in order to hide from members of the public that Dr. Kerr's public apology would occur at the Health Commission on April 2, 2013.

**Complainants respectfully request that the SOTF:**

- a) Issue an Order of Determination that the Health Commission's president, Sonia Melara, Director of Public Health Barbra Garcia, LHH's Executive Administrator Mivic Hirose, and the full Health Commission, violated Sunshine Ordinance §67.7(a), §67.7(b), and §67.9(a) for approving and issuing the clearly deficient April 2 agenda that failed to list any meaningful description for Agenda Item 7.
- b) Order the Health Commission to stop lumping multiple, distinct agenda items embedded inside of a single agenda item.
- c) Order LHH's Mivic Hirose to stop lumping multiple, distinct agenda items embedded inside of a single agenda item (for example the "LHH Update" document), so that she is ordered to stop doing this on LHH's own agendas.
- d) Order the Health Commission to use standard-style HTML formatting to clearly show the usual-and-customary formatting of hyperlinks in underlined blue text on every agenda item of the full Health Commission meetings, and all of the Health Commission's various subcommittee agendas.
- e) Order the Health Commission and Laguna Honda Hospital to always use meaningful descriptions of each agenda item, not just the agenda item's subject title, on each and every agenda for each of the Health Commission's various sub-committees.
- f) Notify each City agency that they **MUST** use meaningful agenda descriptions, not just Agenda item subtitles. Each City department must be notified that meaningful descriptions of each agenda item are required, and they are not permitted to just list an agenda item's subtitle on agendas. Notifying each City department of this requirement could ease future burdens on the Sunshine Ordinance Task Force.

Sincerely,


[signed]  
Maria Rivero, MD

[signed]  
Patrick Monette-Shaw

Enclosure 1: E-Mailed Attachment of Health Commission Agenda April 2, 2013

File Name in E-mail Announcement and on Health Commission's Web Site: A0004022013[fina.pdf](#)

Although Underscored, As If to Suggest a Valid Hyperlink,  
The PDF File Did Not Contain a Working, Active Hyperlink to the "LHH Update" Document

David J. Sanchez, Jr., Ph.D. Commissioner Belle Taylor-McGhee Commissioner	Edwin M. Lee, Mayor Department of Public Health	 Barbara A. Garcia, M.P.A. Director of Health Mark Morewitz, M.S.W. Executive Secretary TEL (415) 554-2666 FAX (415) 554-2665 Web Site: <a href="http://www.sfdph.org">http://www.sfdph.org</a>
<p><u>AGENDA</u> <u>HEALTH COMMISSION MEETING</u> Tuesday, April 2, 2013, 4:00 p.m. 101 Grove Street, Room 300 or Room 302 San Francisco, CA 94102</p>		
1) <u>CALL TO ORDER</u>		
2) <u>PROPOSED ACTION:</u>	<u>APPROVAL OF THE MINUTES OF THE HEALTH COMMISSION MEETING OF MARCH 19, 2013.</u> <i>*Minutes of the meeting of March 19, 2013</i>	
3) <u>FOR DISCUSSION:</u>	<u>DIRECTOR'S REPORT</u> (Barbara Garcia, Director of Health) <ul style="list-style-type: none"><li>• Legislation</li><li>• Programs</li><li>• Budget</li><li>• Departmental News</li><li>• Announcements</li></ul> <i>*Director's Report</i>	
4) <u>GENERAL PUBLIC COMMENT**</u>		
5) <u>FOR DISCUSSION AND POSSIBLE ACTION:</u>	<u>FINANCE AND PLANNING COMM</u>	
6) <u>FOR ACTION:</u>	<u>CONSENT CALENDAR</u> <ul style="list-style-type: none"><li>• APRIL CONTRACTS REPORT</li><li>• <u>REQUEST FOR APPROVAL OF A NEW CONTRACT WITH ASIAN WEEK FOUNDATION IN THE AMOUNT OF \$192,723, WHICH INCLUDES A 12% CONTINGENCY, TO PROVIDE FISCAL INTERMEDIARY SERVICES TO SUPPORT THE HEAL SF B: HEPATITIS B IDENTIFICATION AND LINKAGE TO CARE PROGRAM FOR FOREIGN-BORN PERSONS WITH HEPATITIS B, FOR THE PERIOD OF MARCH 1, 2013 THROUGH SEPTEMBER 29, 2013 (7 MONTHS).</u></li></ul>	
7) <u>FOR DISCUSSION AND POSSIBLE ACTION:</u>	<u>LHH UPDATE</u> (Mivic Hirose, LHH Chief Executive Administrator)	

Visible, standard hyperlink format.

No visible, standard hyperlink format. Underlining is simply text formatting.  
No agenda **description**; simply an Agenda "Title."

The PDF file did not contain a working, active hyperlink to the background file of the so-called "LHH Update" agenda item, and the "LHH Update" document was **NOT** e-mailed to DPH's "interested persons" e-mail list **with** the agenda.

Enclosure 2: On-Line Announcement Page to Health Commission Agenda April 2, 2013

Web Page: <http://www.sfdph.org/dph/comupg/aboutdph/hc/nextMeeting.asp>

**San Francisco**  
Department of Public Health

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## About DPH

### Meetings: Department of Public Health

The full Health Commission April 16th meeting has been rescheduled for 4pm on April 23, 2013.

The 4/2/13 Full Health Commission meeting materials:

- [Agenda](#)
- [Minutes](#)
- Director's Report
- [Report Attachment](#)
- Consent Calendar:
  - [April Contracts Report](#)
  - [Asian Week Foundation Contra](#)
- [LHH Update](#)
- Public Health Week
- Memo
- Resolution
- Presentation

[2012 Public Health Association Confe](#)

The "LHH Update" document was not adjacent to the Agenda, and there's no clue the two documents were even related.

This on-line announcement was only available for a few days on the Health Commission's web site prior to and immediately following the Health Commission's April 2 meeting. It has since been replaced by the posting of the next meeting of the Health Commission.

It was the only page that had contained a working, albeit hidden, hyperlink to the background file titled "LHH Update" that Dr. Rivero inadvertently clicked on, since it was not an apparent hyperlink. Otherwise, members of the public had no way of accessing this file prior to the April 2 meeting. The agenda went missing ("off-line") for several days until it was restored on April 8.

As of April 8, only the agenda document is available on DPH's web site containing past meeting agenda's; the "LHH Update" document has vanished and is no longer available on-line.