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Civil Grand Jury Report on Ethics Commission

Ethics' Pretenses vs. Sunshine

by Patrick Monette-Shaw

The tenuous relationship between San Francisco's Sunshine Ordinance Task Force and the City's Ethics Commission was already the subject of an Ethics Commission complaint filed on June 22 involving probable inappropriate communications from an errant Task Force member to the Ethics Commission that appears to have contributed to conflicting rulings issued by the Ethics Commission.

The very next day, the San Francisco Civil Grand Jury coincidentally issued a blistering report on June 23 that is highly critical — once again — of the Ethics Commission.

Civil Grand Jury Faults Ethics Commission — Again

The 2010–2011 Civil Grand Jury issued a scathing [15-page report](#) three years ago, titled “*San Francisco's Ethics Commission: The Sleeping Watch Dog*,” highly critical of the excessive influence the Ethics Commission's Executive Director, John St. Croix, holds over Ethics Commissioners, leading Commission members to abdicate oversight and their responsibilities to serve as an independent watchdog. The 2011 report contained seven findings and seven recommendations. A new Grand Jury report remains critical of the Ethics Commission.

Among other issues raised, the Jury's June 2011 report focused heavily on the dismissal of all 18 Sunshine complaints referred by the Task Force to the Ethics Commission for enforcement between 2004 — the year St. Croix was first hired — and 2010. Each of the 18 cases was dismissed by the Executive Director; none was ever heard during an open hearing before the Ethics Commission. The Grand Jury's report asserted the Commission's Executive Director controls the “agenda” of the Ethics Commission, and reported that one Commissioner stated that there was an expectation that “... the Commission should support the Executive Director in his decisions to dismiss a case.”

St. Croix's control over the Ethics Commission is a classic example of the tail wagging the dog — a *Sleeping Watchdog*. The Grand Jury noted its 2011 report was not meant to be a definitive report on the Ethics Commission; that report would be left to a future Grand Jury.

Grand Jury's New Report on Ethics Commission

Fast forward to 2014. On June 23, the 2013-2014 Civil Grand Jury released a [43-page report](#) (excluding several appendices) containing 45 findings, and 35 recommendations, titled “*Ethics in the City: Promise, Practice or Pretense*.”

Among other recommendations, the 2014 Grand Jury recommended a two-year pilot contract with California's Fair Political Practices Commission to enforce violations of California Public Records Act and Sunshine Ordinance violations; an audit by the City Attorney of potential improper campaign contributions returned to the contributor, rather than forfeited to the City, as required by City laws; a recommendation that the Board of Supervisors enhance the “Citizen's Right of Action” to enforce the City's ethics law; a policy needs to be developed to preserve e-mails and text messages consistent with preservation of other public records; violations of departmental Statements of Incompatible Activities by City employees and members of boards and commissions should be disclosed; and enhancing the Form 700 *Statements of Economic Interests* City officials are required to submit to make them searchable. There are many more substantive issues raised in the Grand Jury's 2014 report.



Sunshine Ordinance Task Force member David Pilpel has testified to the Ethics Commission several times regarding Sunshine complaints that may end up referred back to the Task Force, and his jurisdiction, clearly a perceived conflict of interest.

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The Ethics Commission's [draft response](#) to the 2014 Civil Grand Jury appears to have been authored by Mr. St. Croix. Of note, during its August 18 special meeting to discuss the Ethics Commission's response to the Grand Jury, Ethics Commissioner Peter Keane — a widely respected Professor of Law and Dean Emeritus at Golden Gate University School of Law who was appointed to the Ethics Commission by City Attorney Dennis Herrera — observed that the draft response was too “defensive,” needed substantial edits, and that a “lot of the language in the proposed draft is inappropriate.” Finally, St. Croix's excessive influence over the Ethics Commission appears to be gradually waning.

Of concern to the 2014 Grand Jury was the failure of the Ethics Commission to produce an annual report about the effectiveness of San Francisco's ethics laws, an annual report required by the City Charter in addition to the departmental annual report required of each City department, and each board and commission. St. Croix's draft response to the Grand Jury claimed that the additional annual report addressing effectiveness of ethics laws “was not necessary,” and “implementation is not up to the Ethics Commission.”

Initially Ethics Commissioner's were poised on August 18 to allow St. Croix's draft language to stand, until they took public comment and heard from both members of the public and members of the Civil Grand Jury, that the second report is required by the City Charter. Only then did the Ethics Commissioners decide to re-write St. Croix's draft response, agreeing that the Ethics Commission should, in fact, develop and submit the supplemental annual report.

St. Croix's Preservation of the Status Quo

The Grand Jury's finding regarding the “Citizen's Right of Action” involved a simple matter to enhance citizen's rights to enforce all of the City's ethics laws. But St. Croix's inflammatory draft language recommended that the Ethics Commission disagree with the Jury's finding and not implement it; he wrote, “absent a problem with the status quo, there is no compelling basis for specific enhancements.”

St. Croix further noted in the Commission's draft response “To our knowledge, no one has ever attempted to use or even inquired about this right [the Citizen's Right of Action].” St. Croix appears to have the mindset that so long as nobody ever attempted to use the right before, there's no need to change the status quo.

The status quo that has developed at the Ethics Commission under St. Croix's decade-long tenure as Executive Director is troubling, in part due to the status quo of his single-handed dismissal of the 18 Sunshine cases referred to Ethics for enforcement during the first six years of his reign.

For his part, Commissioner Keane astutely noted during discussion of the recommendation on August 18, that the Citizen's Right of Action is a “mom-and-apple-pie issue.” Keane asked, “Why would we disagree with a broader right of citizen's access to ethics laws?” After lengthy discussion, the Commission voted to change the recommendation from “disagree,” to “agree,” and agreed to write the second report.

“Designated Filers” Escape Sunshine Training

The Grand Jury wrongly noted that all Form 700 “*Statements of Economic Activities*” are filed electronically. They are not. Only City Department Heads and members of boards and commissions are currently required to file their Form 700's electronically; so-called “designated filers,” who file directly with their City departments, do not file electronically.

San Francisco's [Campaign and Governmental Conduct Code](#) Sections 3.1-110 through 3.1-457 enumerates a total of 1,524 positions listed by working job titles as being required to file Form 700's with either the Ethics Commission, or to their

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Departmental “Filing Officer.” Of those, just 533 were required to begin submitting them electronically to the Ethics Commission in April 2014.

Of the 533, there were just 57 City department heads and a few senior managers who filed Form 700’s with Ethics (10.7%), 390 members of boards and commissions filed with Ethics (73.2%), and another 86 (16.1%) were filed with Ethics by filers who aren’t even enumerated in the Governmental Code.

Sunshine Ordinance Section 67.33 requires Form 700 filers who file directly with the Ethics Commission to also submit an annual “Sunshine Ordinance Declaration” to the Ethics Commission. California Government Code Section 53235 requires Form 700 filers who file directly with the Ethics Commission to also submit a bi-annual “Certificate of Ethics Training.” There is no local regulation requiring other types of Form 700 filers to take either of the two trainings.

This effectively means that approximately 1,077 (fully 70.7%) of the 1,524 positions enumerated in the Governmental Conduct Code who are “designated” filers do not file electronically. No date has been set as to when the 1,077 “designated” filers will be required to start filing electronically, or with whom. Designated filers are not required to submit annual statements that they’ve taken Sunshine Ordinance Training, or that they’ve taken the bi-annual Ethics Training required of those who file directly with the Ethics Commission. That’s a significant number of City employees who receive little training on Sunshine requirements.

In fact, of the 37,606 City employees in the City Controller’s payroll database for CY 2013, fully 37,549 file neither Form 700’s nor are required to take Sunshine and Ethics training — 99.98% of all City employees with no such requirement. Only 57 of the City’s 37,606 City employees — less than two-tenths of one percent — have such a requirement. It appears 37,549 City employees may never receive any notice that they are required to comply with the Sunshine Ordinance.

Ethics Commission Rejected More From St. Croix’s Draft Response

Among other changes described above, the Ethics Commission reversed more of St. Croix’s draft responses, including:

- The Grand Jury is concerned that improper election campaign contributions were returned to the contributor, rather than forfeited to the City, as required by City law. The Grand Jury recommended that the Board of Supervisors should request the City Attorney’s Office conduct an independent audit to determine whether prohibited campaign contributions were actually forfeited to the City.

Although the Grand Jury didn’t ask Ethics to respond, St. Croix included a response anyway, asserting that since August 2008, the Ethics Commission has followed a policy it set (in potential contradiction of City law) to allow campaigns to return donations to donors prior to any action being taken by the Commission. St. Croix asserted that the Commission has authority to waive or reduce forfeitures. Once again, it was Commissioner Keane who introduced a motion to strike out St. Croix’s draft language, and recommend that the Board of Supervisors should, in fact, ask the City Attorney to conduct an audit of potential improperly returned campaign contributions rather than forfeitures.

- The Grand Jury made a number of recommendations regarding Form 700 *Statement of Economic Interests* that are filed after the required April 1 deadline, specifically noting that the Ethics Commission should recommend dismissal for any officer or employee who fails to file their Form 700 within 90 days after the deadline (Recommendation 14b), and should recommend dismissal for employees who file inaccurate Form 700’s (Recommendation 14c). The Grand Jury also recommended that all Form 700 filers — including “designated filers” who currently only submit their Form 700 to their departmental filing officer — be required to file them with the Ethics Commission (Recommendation 14d).

Initially, St. Croix’s draft response to Grand Jury Recommendations 14b and 14c was “would not be implemented,” as

“ Designated filers are not required to submit annual statements that they’ve taken Sunshine Ordinance Training, or that they’ve taken the bi-annual Ethics Training required of those who file directly with the Ethics Commission. ”

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being outside of the Ethics Commission’s jurisdiction. But after lengthy debate the Commissioners changed the response to the Grand Jury saying that Recommendations 14b and 14c “will be implemented in amended form,” indicating that the Ethics Commission will instead recommend to the appropriate appointing authority suspension (rather than dismissal) of an employee who fails to file their Form 700 within 90 days of the deadline. In its final response to the Grand Jury, the Commissioners removed St. Croix’s claim that dismissal or suspension recommendations of City employees fall outside of the Commission’s jurisdiction.

Ethics Commission Fails to Correct Other Flaws in St. Croix’s Draft Response

Although Commissioner Keane astutely introduced motions to change many of St. Croix’s inflammatory draft responses, several glaring mistakes went unchallenged:

- Sadly, both the Ethics Commission’s draft response and its [final response](#) to the Grand Jury adopted by the Ethics Commissioners failed to address Grand Jury Recommendation 11 dealing with retention and preservation of e-mails and text message consistent with preservation of other public records. Indeed, in its final response to the Grand Jury, the Ethics Commissioners let stand St. Croix’s ridiculous nonsense that “the City’s document retention policy does not require retention of correspondence for any specific period of time.”

To the contrary, San Francisco Administrative Code Section 8.3 expressly provides that current records may only be destroyed five years after they were created, and then only if they have served their purpose and are no longer required for any public business. This stands in stark contrast to St. Croix’s claim — which Ethics Commissioner’s apparently didn’t even think to question — that there is no “specific period of time” for records retention.

“ While the City’s overall records retention and destruction policy may not address retention of correspondence, as St. Croix claimed, many individual City department’s unique records retention and destruction policies do require retention of correspondence, typically retention for two years. ”

While the City’s overall records retention and destruction policy may not address retention of correspondence, as St. Croix claimed, many individual City department’s unique records retention and destruction policies *do* require retention of correspondence, typically retention for two years. The Commissioners should have recommended that the City’s Administrative Code be revised to adopt a two-year retention period, as required by California Government Code Section 34090¹, which states that the destruction of records less than two years old is not authorized.

Although the Ethics Commission’s response to the Grand Jury got it wrong on this point, the Sunshine Task Force’s response to the Grand Jury on the same recommendation and same issue got it right: The Task Force rightfully noted that Section 8.3 of San Francisco’s Administrative Code should be amended to comply with California Government Code Section 34090. The Task Force should have gone a step further and recommended that a Sunshine training video on the City Attorney’s web site also needs to be updated to clarify the two-year record retention period.

“ The Task Force rightfully noted that Section 8.3 of San Francisco’s Administrative Code should be amended to comply with California Government Code Section 34090. ”

The Ethics Commission also got it wrong on this point, because even the City Attorney’s misguided [Good Government Guide](#) updated on September 3, 2014 — which Commissioner Keane has previously indicated carries no force of law, and is merely an advisory document — clearly notes on page 113 regarding records retention schedules, that State law (citing Government Code Section 34090) “sets a ‘floor’ for records retention” of two years.

St. Croix’s draft response — which the Ethics Commissioner’s again mistakenly let stand in the final response to the Grand Jury — claimed “departments are free to create more restrictive [records retention] rules as they find necessary.” Departments are *not* “free” to override Government Code Section 34090 on a department-by-department basis (any more than the City’s claim that the Sunshine Ordinance cannot “trump” the City Charter, it’s clear that department-specific policies and procedure manuals cannot trump State law). At minimum, the Ethics Commission should have recommended that departmental records retention policies be standardized to require the two-year records retention.

¹ Government Code 34090 is contained in California’s Title IV “Government of Cities,” Division 1 “Cities Generally,” Article 4, “Miscellaneous.”

In addition, St. Croix’s draft response and the Ethics Commission’s final response to the Grand Jury completely sidestepped the issue of whether a uniform policy regarding retention of e-mails generated using City-issued e-mail accounts, and on City-issued cell phones and electronic equipment, needs to be developed now, rather than waiting on an eventual California Supreme Court ruling pending before it regarding e-mails and text messages sent using personally-owned digital equipment.

Whatever outcome of the Supreme Court case regarding personal devices used to conduct official City business, the fact remains that there is currently no consistent Citywide policy on preservation of e-mails and text messages, or social media content on City-funded social media accounts, for retention of these materials generated using City-issued e-mail accounts and City-issued electronic devices.

The Ethics Commission completely sidestepped this concern of the Civil Grand Jury in its formal response to the Jury. For its part, the [City Attorney’s response](#) to the Civil Grand Jury somewhat sidestepped the issue. The City Attorney asserted that developing a policy to preserve e-mails [even those generated on a City-issued e-mail account] is a “policy matter for the Ethics Commission and other appropriate City agencies, such as the Board of Supervisors and the Mayor,” and indicated the City Attorney would “assist” other agencies implement the recommendation to develop a policy, but only if such assistance is requested.

At minimum, such a policy governing City-issued equipment and accounts needs to be developed immediately.

- Unfortunately the Ethics Commissioner’s let stand St. Croix’s ridiculous assertion in response to Jury Recommendation 20 involving use of an independent hearing officer for complex cases that the Ethics Commission is a “law enforcement agency,” and the Sunshine Task Force is merely an “advisory body.” Both assertions are wrong.

San Francisco’s Ethics Commission is not a law enforcement agency as defined for law enforcement agencies. At best, it is an advisory or oversight body that enforces campaign and government conduct laws, but that does not make Ethics a law enforcement agency. Were the Ethics Commission a law enforcement agency, so too would the Sunshine Task Force be, since the Task Force also was created to adjudicate violations of our Sunshine laws.

The Task Force is *not* merely an “advisory body,” as both Mr. St. Croix and all five of the Ethics Commissioners must surely know (if they don’t already know this, they shouldn’t even be Ethics Commissioners). In addition to providing advice as just one of its duties, the Task Force’s larger duty is as a quasi-judicial body charged with adjudicating disputes between members of the public seeking access to public meetings and public records, and the very City agencies that thwart access to public meetings and public records. Even the City Attorney’s Sunshine training video for those required to file their Form 700’s directly to the Ethics Commission acknowledges the Task Force is an adjudicatory body, not merely an advisory body.

“ There is currently no consistent Citywide policy on preservation of e-mails and text messages, or social media for retention of these materials generated using City-issued e-mail accounts and City-issued electronic devices. ”

“ The Ethics Commission is not a law enforcement agency as defined for law enforcement agencies. And the Task Force is not merely an ‘advisory body,’ as both Mr. St. Croix and all five of the Ethics Commissioners must surely know. The Task Force’s larger duty is as a quasi-judicial body charged with adjudicating disputes between members of the public seeking access to public meetings and public records, and the very City agencies that thwart access to public meetings and public records. ”

Ethics Commission Rejects Two Key Issues of Concern to the Grand Jury

The Ethics Commission rejected two key issues raised by the Grand Jury:

- The Grand Jury’s first major recommendation was to develop a contract with California’s Fair Political Practices Commission on a two-year pilot basis to hear and enforce major enforcement cases, including official misconduct, conflict of interest, campaign finance and lobbying violations, and violations of post-employment restrictions to enforce both state and local ethics laws.

The Ethics Commission's response to the Grand Jury was "Will not be implemented," under the claim that "the Ethics Commission sees no need for this and it is possible the [City] Charter would prohibit such a contract." The Ethics Commission did acknowledge that the FPPC has a pilot program with the County of San Bernardino, but that is the only jurisdiction currently permitted such a pilot program under state law. Rather than investigating whether the City Charter was permit such a contract, the Commissioners simply went with the *possibility* that it *might* be prohibited.

- Concerned that the Sunshine Ordinance Task Force and the Ethics Commission have legal and procedural differences in their processes and their legal requirements that result in disharmony between the two oversight bodies, the Grand Jury recommended that arrangements should be made to use an independent hearing officer to develop a consistent, legally-sufficient record of any given case.

Again, the Ethics Commission's response to the Grand Jury was:

"Will not be implemented," saying "The Ethics Commission does not agree with this finding and believes it is in the public's best interest to have the Commission continue to investigate and hear Sunshine referrals and complaints. Further, there is no mechanism in the Sunshine Ordinance to do this."

First, it would be a simple matter to amend the Sunshine Ordinance to provide a mechanism to hire an independent hearing officer. But the Ethics Commission does not want the status quo changed, as St. Croix observed regarding another Grand Jury recommendation.

It is painfully clear, given St. Croix's track record of dismissing the 18 Task Force referrals to Ethics for enforcement between 2004 and 2010, that he is not interested in changing the status quo, and wants to retain his past practice of finding exculpatory excuses to let City officials off of the hook by dismissing Sunshine complaints filed against them.

"The best interests of members of the public would be to have an independent hearing officer take over, but that might lead to more public officials being found guilty of having violated our ethics laws, an outcome St. Croix is desperate to prevent."

Given St. Croix's track record, the best interests of members of the public would be to have an independent hearing officer take over, but that might lead to more public officials being found guilty of having violated our ethics laws, an outcome St. Croix is desperate to prevent. So it is not surprising that the Ethics Commission rejected this Grand Jury recommendation in a turf-protecting move.

The Ethics Commission may want to preserve the City's status quo by retaining the current authority to appointment both Ethics Commissioners and members of the Sunshine Ordinance Task Force. Appointees chosen by the Mayor, Board of Supervisors, and the City Attorney are easier to control than an independent hearing officer. After all, an independent hearing officer may be a wild card the Mayor and Board of Supervisors don't want established who might find and uphold violations of our ethics laws by City officials.

A Wayward Sunshine Task Force Member

On April 28, 2014 Sunshine Ordinance Task Force member David Pilpel appears to have violated the Statement of Incompatible Activities (SIA) applicable to Task Force members when he spoke during the public comment period on a matter under discussion by the Ethics Commission that was referred by the SOTF for enforcement, by introducing himself as "David Pilpel, member of the Sunshine Ordinance Task Force."

The [SIA applicable](#) to Pilpel clearly provides that no officer may hold himself or herself out as a representative of the Task Force, or as an agent acting on behalf of the Task Force, unless authorized to do so. Pilpel had not requested or received a waiver known as an Advance Written Determination from either the Board of Supervisors, or from the Ethics Commission, exempting him from this SIA prohibition.

"Pilpel's testimony on April 28 deprived Maionchi of due process notice that Pilpel intended to advocate before the Ethics Commission to undercut and overturn a prior decision the full Task Force had previously ruled appropriate."

Pilpel appears to have directly interfered with the Task Force’s referral of Sunshine complaint #12-058, *Dominic Maionchi vs. Recreation and Parks Department* to the Ethics Commission in a case involving Rec and Park’s General Manager Phil Ginsburg over failure to release public documents regarding leases of boat slips. Pilpel’s testimony on April 28 deprived Maionchi of due process notice that Pilpel intended to advocate before the Ethics Commission to undercut and overturn a prior decision the full Task Force had previously ruled appropriate. Pilpel’s testimony on April 28 helped convince the Ethics Commission to [reject the complaint](#) and return it to the Task Force for having named the so-called “wrong actor” (Department Head Ginsburg) in SOTF’s referral for enforcement to Ethics. Pilpel’s testimony ended up letting Ginsburg off the hook when the Ethics Commission ruled against Maionchi.

“ A formal complaint about Pilpel’s probable April 28 violation of the SIA filed with the Clerk of the Board of Supervisors and forwarded to the Ethics Commission on June 25, remains a pending Ethics complaint that has not been dismissed. ”

Although Pilpel has fretted extensively about the due process rights of departmental respondents and the “actors” named as having violated the Sunshine Ordinance and their due process rights, when it comes to the due process rights of complainants, Pilpel appears to be not quite so interested. Pilpel provided no due process notification to Maionchi — or to his fellow SOTF members — that he, Pilpel, intended to advocate against the SOTF referral of *Maionchi vs. Recreation and Parks* on April 28 before the Ethics Commission.

A formal [complaint](#) about Pilpel’s probable April 28 violation of the SIA filed by this author on June 22 with the Clerk of the Board of Supervisors that was forwarded to the Ethics Commission on June 25, remains a pending Ethics complaint that has not been dismissed.

“ Commissioner Keane suggested that the Ethics Commission may have erred in April ‘punting’ the *Maionchi* matter involving Ginsburg back to the Task Force for ‘further factual information’. ”

Notably, Ethics Commissioner Peter Keane observed on July 28 — during Commissioner debate and discussion on the separate, unrelated SOTF *Mica Ringel* referral to Ethics for enforcement involving largely the same issues in the *Dominic Maionchi* case — that the Ethics Commission may have erred on April 28 when it found Ginsburg *had not* violated the Sunshine Ordinance, after the Ethics Commission determined on July 28 that in a very similar case, John Rahaim, Director of the Planning Commission, *had* violated the Sunshine Ordinance, essentially involving the same underlying issue of naming department heads as ultimately responsible for the actions or inactions of their subordinates. Keane suggested that the Ethics Commission may have erred in April “punting” the *Maionchi* matter involving Ginsburg back to the Task Force for “further factual information.”

“ The Commission’s ruling sustaining the Task Force’s finding that Planning Director Rahaim violated the Sunshine Ordinance was an historic moment, since it was the first time the Ethics Commission ruled a department head violated the Ordinance. And the first time the Commission issued a cease-and-desist order involving Sunshine Ordinance violations. ”

The Ethics Commission’s ruling sustaining the Task Force’s Order of Determination finding that Planning Director Rahaim had violated the Sunshine Ordinance was an historic moment, since it was just the second time that the Ethics Commission upheld a Task Force referral for enforcement, and was the first time that the Commission ruled a department head had, in fact, violated the Sunshine Ordinance. And the first time the Commission issued a [cease-and-desist order](#) involving Sunshine Ordinance violations.

Phil Ginsburg and “Further Factual Information”

Four months after the Ethics Commission referred the *Maionchi* matter back to the Sunshine Task Force on April 28 for further factual information about whether Phil Ginsburg was the properly-named respondent in the Maionchi complaint, Ginsburg suddenly responded when the matter was scheduled for preliminary re-review at the Sunshine Task Force’s September 3 regularly-scheduled meeting.

During the full year between May 1, 2013 (when the Task Force first heard Maionchi’s December 12, 2012 complaint) and April 28, 2014 when the Ethics Commission finally considered the Task Force’s referral for enforcement naming Ginsburg as responsible, Ginsburg had never appeared at either multiple Task Force hearings or at the Ethics Commission hearing, instead sending subordinates to fall on his sword during hearings to defend him.

So it was surprising that on September 3, Ginsburg finally [submitted a letter](#) to the Task Force defending himself for the first time, perhaps hoping he could influence the “further factual information” requested by the Ethics Commission.

Ginsburg admits in the letter he was aware of Maionchi’s records request and subsequent Sunshine complaint, but that the records did not rise to the level of calling for the “time and attention of [Rec and Park’s] General Manager” and he was not personally involved in the redaction of information provided to Maionchi. Instead, Ginsburg asserts he is fully supportive of his staff who decided to redact the records provided to Maionchi. Ginsburg claims the redaction is consistent with “widespread City practices” guided by long-standing “public advice” in the City Attorney’s Good Government Guide.

Ginsburg twice referred in his September 3 letter that the Good Government Guide has long provided “public advice,” all but ignoring that the advice may not be accurate “legal advice,” and simply public advice. No matter how “long-standing” or “widespread” the practice has been doesn’t automatically justify the past practice, nor make the “public advice” valid legal advice. And Ginsburg may be unaware Ethics Commissioner Keane has stated publicly that the Good Government Guide carries absolutely no force of law. The Guide is a flawed guideline, not law.

Observers now wonder whether Ginsburg submitted his September 3 letter only after the Ethics Commission issued its cease-and-desist letter against Planning Director Rahaim finding that Department Heads are, of course, responsible for the actions and inactions of their subordinates. Others wonder whether Ginsburg only submitted his letter after Commissioner Keane indicated on July 28 that the Ethics Commission may have erred three months earlier in the *Maionchi* case punting it back to the Task Force.

Could it be that Ginsburg is now worried that if the Task Force returns the *Maionchi* case back to the Ethics Commission asserting that the Ethics Commission can’t have it both ways ruling differently between the *Maionchi* case and the *Ringel* case, that Ginsburg may eventually be found by Ethics to have also violated the Sunshine Ordinance, just as Ethics found Rahaim had?

The Task Force asserted during its September 3 meeting that it will not re-adjudicate the entire matter again in light of Ginsburg’s unexpected September 3 letter, and will focus instead at its next meeting on how to respond to, and return the case to, Ethics.

A Second SIA Violation

On July 28, 2014, Member Pilpel again spoke before the Ethics Commission during public comment on Sunshine complaint #13-024, *Mica Ringel vs. Planning Department* being heard by the Commission. Although Pilpel claimed to be speaking as an individual, within the first minute-and-a-half of his testimony he switched from using the first person “I,” into using multiple times the third person “we,” again appearing to be speaking on behalf of, and representing, the Task Force.

Pilpel again questioned whether the “right” actor had been referred to the Ethics Commission, and suggested he wasn’t sure City Departments could be named as having violated the Sunshine Ordinance, rather than naming an *individual* who may have violated the Sunshine Ordinance.

The Ethics Commission had none of it with Pilpel’s July 28 line of reasoning.

Instead, a nondescript, unprintable [Enforcement Summary](#) posting buried on the Ethics Commission web site notes that on July 28:

“The [Ethics] Commission found that John Rahaim, Director, Planning Department, non-willfully violated Sunshine Ordinance section 67.21(a). The Commission found that there was not sufficient evidence to support a finding that there was a violation of Sunshine Ordinance section 67.29-7. But the

“ The Commission ordered [its] Executive Director [John St. Croix] to post on the Commission’s website the Commission’s finding that Director Rahaim violated the Sunshine Ordinance and to inform the Planning Commission of the violation. ”

“ The Ethics Commission can’t have it both ways, ruling against *Maionchi* and ruling for *Ringel* in two similar cases in which Department Heads had been named as responsible for Sunshine violations in Task Force referrals to Ethics. ”

“ Others wonder whether Ginsburg only submitted his letter after Commissioner Keane indicated on July 28 that the Ethics Commission may have erred three months earlier in the *Maionchi* case. ”

Commission *ordered* Director Rahaim to *cease and desist* from failing, without unreasonable delay, to permit public records to be inspected and examined. The Commission ordered [its] Executive Director [John St. Croix] to post on the Commission’s website the Commission’s finding that Director Rahaim violated the Sunshine Ordinance. The Commission ordered [its] Executive Director to issue a warning letter to Director Rahaim and inform the Planning Commission of the violation.”

The Ethics Commission can’t have it both ways, ruling against *Maionchi* and ruling for *Ringel* in two similar cases in which Department Heads had been named as responsible for Sunshine violations in Task Force referrals to the Ethics Commission.

Notice was received on August 15 that a [second SIA complaint](#) against Pilpel involving the Ethics Commission’s July 28 hearing was dismissed by the Ethics Commission’s Executive Director on August 13. In dismissing the second SIA complaint against Pilpel, St. Croix only cited Section III.A.1, “*Activities that Conflict with Official Duties,*” of the applicable SIA.

St. Croix made no mention in his dismissal letter of Section III.B.1 of the SIA, “*Restrictions That Apply to Officers or Employees in Specified Positions,*” which provides that certain activities are also expressly prohibited for individual officers and employees holding specific positions, notwithstanding Section III.A.1.

Section III.B.1 expressly prohibits officers and members of the Task Force from providing advice concerning Sunshine Ordinance complaints to other entities, such as the Ethics Commission. Section III.B.1 states:

*“Unless otherwise expressly permitted by state or local law and regulation, no officer or employee may assist, **advise** or represent other persons or **entities** concerning Sunshine Ordinance complaints or concerning matters that may appear before the Task Force, regardless of whether the activity is compensated.”* [emphasis added]

Because Pilpel has no way of knowing whether any given referral sent to the Ethics Commission for enforcement will be returned to his jurisdiction as a member of the Sunshine Task Force, he should not be providing advice to the Ethics Commission on a matter that may well end up subsequently appearing before him again.

Pilpel is clearly entitled to his own First Amendment rights to free speech on any other issue or matter *outside* the scope of his duties on the Task Force. For example, he is entitled to appear and testify before the Planning Commission as a private citizen on a matter that may affect his neighborhood. But when it comes to matters involving his duties as a Task Force member, he loses Free Speech rights to comment wherever he likes about matters that fall *inside* his Task Force duties, particularly when those matters may be returned to the Task Force for his further consideration as part of his duties.

Ex Parte Communications

St. Croix’s dismissal of the second SIA complaint against Pilpel without considering SIA Section III.B.1, and without considering prohibitions against *ex parte* communications, is troubling.

The Sunshine and Ethics training provided by the City Attorney’s office in the “[Sunshine & Ethics Training Video](#)” from 2014 on the City Attorney’s web site that Mr. Pilpel is required to have watched as part of his annual and bi-annual filings, indicates that boards and commissions such as the Sunshine Task Force may act like an adjudicative court, and must protect the parties due process rights. Commissioners — and members of the Sunshine Task Force — must act like judges, including following procedural rules such as bans on *ex parte* communications.

Pilpel’s *ex parte* communications to the Ethics Commission does not illustrate to Sunshine complainants that he is unbiased, nor do they illustrate that he will be a fair “judge” hearing current or future Sunshine complaints.

“ St. Croix made no mention in his dismissal letter of Section III.B.1 of the SIA, ‘Restrictions That Apply to Officers or Employees in Specified Positions,’ which provides that certain activities are also expressly prohibited for individual officers and employees holding specific positions. ”

“ The Ethics Commission Executive Director’s dismissal of the second SIA complaint also did not address prohibition against *ex parte* communications. ”

The Ethics Commission Executive Director's dismissal of the second SIA complaint also did not address prohibitions against *ex parte* communications.

To the extent that Pilpel testified to the Ethics Commission on July 28 regarding the *Ringel vs. Planning Department* Sunshine complaint — whether as a member of SOTF or as a member of the public — he was clearly engaging in providing advice to the Ethics Commission (as an entity) concerning a Sunshine complaint that may appear again before the Task Force, which is clearly a matter that falls **inside** the scope of his duties as a member of the Task Force.

Since the Task Force will, in fact, discuss how to respond to the Ethics Commission's request for "further factual information" on the *Maionchi* case at its September special meeting, Pilpel should rescue himself from the discussion and voting, given his April 28 *ex parte* communications to Ethics concerning a case returned to the Task Force that falls **inside** the scope of his duties.

“ Once the full Task Force had ruled to refer a willful violation to the Ethics Commission for enforcement, Pilpel should not have engaged in *ex parte* communications with the Ethics Commission on July 28.”

When Pilpel testified on July 28, he appears to have either concealed information or possibly misled the Commission. Pilpel failed to inform the Ethics Commission on July 28 that during a Task Force committee meeting on January 13, 2014 he had voted in support of a motion to refer the *Ringel* case back to the full Task Force's jurisdiction, which passed 3 to 0. Pilpel also failed to inform the Ethics Commission on July 28, that on February 5, 2014 a motion was introduced during a full Task Force hearing to find John Rahaim, Director of the Planning Department, in violation of the Sunshine Ordinance for willful failure to comply with the Sunshine Ordinance Task Force's Order of Determination dated October 23, 2013, and to refer Sunshine Complaint 13-024 to the Ethics Commission on a vote of 7 to 1, with Pilpel being the lone dissenter.

Once the full Task Force had ruled to refer a willful violation to the Ethics Commission for enforcement, Pilpel should not have engaged in *ex parte* communications with the Ethics Commission on July 28 by arguing during his testimony that the wrong "actor" had been named by the Task Force in the *Ringel* referral to Ethics and seeking to substitute his minority opinion for the majority opinion of the full Task Force's decision.

“ Pilpel was directly interfering with the Task Force's referral to the Ethics Commission without authorization from the Task Force to do so.”

Due to potential improprieties in St. Croix's August 13 dismissal of Pilpel's probable second SIA violation, an [appeal of the dismissal](#) will be submitted to the Ethics Commission at its September 22 meeting.

Censuring Pilpel

One former Chairperson of the Task Force who spoke on condition of anonymity noted: "I am more and more convinced that censuring Pilpel is something the Task Force should seriously consider. He appears to be attempting to sabotage the Task Force before the Ethics Commission."

A second former Chairperson of the Task Force who also spoke on condition of anonymity observes:

"I find that Pilpel's conduct during the Ethics Commission meeting rises to the level of warranting censure by the SOTF. He clearly and without question held himself out to the Ethics Commission during a hearing on a Task Force referral as being able to represent how the Task Force had assessed the Sunshine complaint. Pilpel was directly interfering with the Task Force's referral to the Ethics Commission without authorization from the Task Force to do so. Censure is more than appropriate to ensure the integrity of Task Force findings, since censure is an option allowed under Roberts Rules of Order."

It is thought the Task Force may soon consider whether to censure Pilpel. If they do, he will earn the distinction of being the sole member of the Task Force across its 20-year history to be considered for censure.

Starving the Sunshine Task Force

One of the quickest ways City government uses to silence its critics is to reduce budgets. That may explain why the Sunshine Task Force appears to function on a shoestring budget of less than \$200,000 to \$300,000 annually, which stands in stark contrast to the \$2.2 million to \$2.6 million Ethics Commission budget.²

So it came as little surprise when the City attorney assigned to the Sunshine Task Force, Deputy City Attorney Nicholas Colla, announced during the Task Force's July 22, 2014 meeting that beginning in August, his superiors were reducing his hours to provide legal advice to the Task Force, that he would no longer be attending the Task Force's occasional second "special meeting" in any given month, and would only attend the Task Force's regularly scheduled meetings, given budget concerns.

“ Deputy City Attorney Nicholas Colla announced during the Task Force’s July 22, 2014 meeting that beginning in August, his superiors were reducing his hours to provide legal advice to the Task Force. ”

This sudden change came as a surprise to the Task Force members, and strangely, the news was not reported in the Task Force's July 22 meeting minutes.

But it's surprising, in part, because approximately two years ago, this reporter bumped into City Attorney Dennis Herrera in the lobby of City Hall while talking with Westside neighborhood leader George Wooding. When asked in 2012 whether he would work at strengthening the Sunshine Task Force, Herrera replied that the Task Force's biggest problem was its minuscule budget.

The Task Force does not have its own City budget. Instead, it relies on "work order" support from the Board of Supervisors for clerical and administrative support, and from the City Attorney's Office for legal advice. Ironically, efforts to obtain the actual budgeted dollar amount provided to support the Task Force have been stymied by the City Attorney's Office itself.

Although Clerk of the Board Angela Calvillo promptly responded on July 29 to a records request placed on July 27 by providing the requested budget data for the current year (FY 14-15) and the previous two fiscal years (FY 12-13 and FY 13-14), the City Attorney's Office has failed to produce similar requested public records.

Despite seven e-mails to Dennis Herrera's press secretary, lawyer Matt Dorsey, beginning on July 27 and eight e-mails to Gabriel Zitrin — who has a City Job Classification code of 8150, Claims Investigator but uses a working job title of "Deputy Communications Director" for the City Attorney's Office — a complete response to a relatively simple records request remains incomplete six weeks after placing the initial request.

“ When asked in 2012 in the lobby of City Hall while talking with Westside neighborhood leader George Wooding whether he would work at strengthening the Sunshine Task Force, City Attorney Dennis Herrera replied that the Task Force’s biggest problem was its minuscule budget. ”

Zitrin's [first response](#) provided not budgeted data, but actual billed dollar amounts. When subsequently asked to provide budgeted hours and budgeted dollar amounts as initially requested, Zitrin eventually provided in a [second response](#) just budgeted attorney hours without the budgeted dollar amount, with no information on how to convert the budgeted hours to budgeted dollars, and failed to include budgeted hours for FY 14-15.

Based on calculating budgeted hours for the City Attorney, it appears SOTF's budget for FY 13-14 was just \$156,253:

² The Ethics Commission's annual budget hovers at \$4.5 million, a significant portion of which is dedicated to public financing of campaigns; the Ethics Commission's actual operating budget for FY 12-13 was \$2,256,239, and is \$2,625,384 for FY 14-15.

Table 1: Estimated Budgeted Dollars to Support SOTF

Funding Source	FY 2011–2012	FY 2012–2013	FY 2013–2014	FY 2014–2015
Board of Supervisors for Sunshine Task Force Administrator *		\$110,197	\$130,286	\$134,551
City Attorney for Deputy City Attorney's Legal Advice to SOTF **		\$25,967	\$25,967	TBD
Combined SOTF Budget		\$136,164	\$156,253	?

* Actual amount for job classification code 1492, *Assistant Clerk, Board of Supervisors*, presumably including salary + fringe benefits at the highest step in the job classification.

** Estimated amount based on incomplete public records response; calculated using 2,080 hours for a full-time equivalent 8177, *Attorney (Civil/Criminal)*, that at job step 16 earns \$177,814 annually, plus approximately 35% fringe benefits, extrapolated to just 225 hours.

Source: Response to Public Records Requests placed with the Clerk of the Board of Supervisors and City Attorney's Office.

Zitrin and Dorsey provided no explanation regarding why the actual billed hours for both FY 12-13 and FY13-14 exceeded the budgeted hours significantly, and they failed to explain two months into the current FY that began July 1, 2014 why the City Attorney is reporting budgeted hours to support the SOTF as still “To Be Determined”:

Table 2: City Attorney's Budgeted Hours to Support SOTF

City Attorney's Budgeted Hours	FY 2011–2012	FY 2012–2013	FY 2013–2014	FY 2014–2015
City Attorney's "Budgeted Hours" to Support SOTF		225.00	225.00	TBD
City Attorney's Actual Billed Hours	437.25	294.50	658.00	
Billed Hours in Excess of City Attorney's Budgeted Hours		69.50	433.00	?
City Attorney's Actual Billed Amount	\$96,689	\$68,576	\$141,497	

Source: Response to Public Records Request placed with the City Attorney's Office.

Of interest, Table 2 show, the City Attorney’s actual billed dollar amount to support the Task Force dropped dramatically in FY 12-13 to just \$68,576, in large measure due to the six-month period in which the Task Force was unable to meet because the Board of Supervisors had failed to appoint a disabled member to the Task Force. Zitrin and Dorsey provided no information as to why the actual billed dollar amount for FY 13-14 jumped to \$141,497, nearly \$50,000 higher than in FY 11-12.

The Deputy City Attorney (DCA) assigned to the Task Force has two functions:

First, to provide legal advice orally during Sunshine Task Force meetings. There was just one additional “special meeting” held in FY 13-14, in addition to the 12 regular meetings. There was no appreciable increase in the number of meetings between FY 11-12 and FY 13-14 to justify a \$50,000 increase in actual budgeted hours for City Attorney advice to the Task Force during its meetings.

The DCA’s second function is to assess each Sunshine complaint filed and prepare an instructional memo for the Task Force outlining legal issues involved in each complaint prior to an SOTF hearing on a complaint. Additionally, the DCA is occasionally asked by the Task Force to research and report back on legal issues, but this function in rare.

“ Zitrin and Dorsey provided no information on why the actual billed amount for FY 13-14 suddenly jumped to \$141,497, when based on just 225 budgeted hours, the budget should have been approximately \$25,967. ”

Zitrin and Dorsey provided no information on why the actual billed amount for FY 13-14 suddenly jumped to \$141,497, when based on just 225 budgeted hours, the budget should have been approximately \$25,967, as shown in Table 1. They also provided no information on why the 225 budgeted hours for FY 13-14 soared to 658 hours, 433 hours higher than budgeted.

And Zitrin and Dorsey provided no explanation as to why the actual billed hours for FY 13-14 was 221 hours higher than in FY 11-12, or what required 658 DCA billed hours in FY 13-14.

Since announcing the reduction in hours he will be allowed attend Task Force meetings, DCA Colla has not attended the second meeting of the Task Force in August and probably won't in September, and has been observed during the Task Force's regular meetings on August 6 and September 3 to leave the meetings at around 9:00 p.m., prior to meeting adjournment. The cutback in his support to the Task Force appears to be restricted to approximately five hours per meeting.

The \$50,000 increase in actual billed dollars between FY 11-12 and FY 13-14 to just \$141,497 in City Attorney time to support the SOTF pales in comparison to the \$41.1 million in total pay (including overtime) paid to City Attorney staff (excluding fringe benefits) in Calendar Year 2013. The \$50,000 increase is a drop in Herrera's \$41 million salaries bucket.

Rather than expanding the Task Force's budget, City Attorney Dennis Herrera appears to be starving SOTF's budgeted support. But why would he do that?

Analysis of Sunshine Complaints

One possible answer to why the City may be further starving SOTF's budget may be explained by the number of Sunshine complaints filed with the Task Force, even though the SOTF has no control over how many complaints against City departments are filed each year.

As the pie chart below shows, during calendar years 2012 and 2013 there were a total of 150 Sunshine complaints filed, 29 of which involved San Francisco Legislative Branch (Board of Supervisors) and six of which involved the Executive Branch (the Mayor and his various sub-departments). Between them, the Legislative and Executive Branches received nearly one-quarter of Sunshine complaints filed.

Add on to that the 14 Sunshine complaints filed against the City Attorney or the City Attorney's Office, which push the total to 49 complaints between the City Attorney and Legislative and Executive Branches, well over one-third of the complaints.

Then, another 30 complaints were filed against the MTA, MTA's Board of Directors, and five other City Departments who each had four or more Sunshine complaints filed against them.

Between the seven City departments — the City Attorney's Office, MTA, the Public Library and its Library Commission, the City Controller's Office, the Community Housing Partnership, Department of Public Works, and the Recreation and Parks Department — plus the Legislative and Executive Branches, fully 79 of the 150 complaints (53%) were against approximately just nine City departments.

By way of contrast, the remaining 71 complaints (47% of 150) were spread across 30 other City departments.

Although the Task Force has no control over how many Sunshine Ordinance complaints are filed, or against which City departments, it appears the Task Force is being starved of budgeted resources to deal with the caseload of complaints.

“ Since announcing the reduction in hours he will be allowed attend Task Force meetings, DCA Colla has not attended the second meeting of the Task Force in August and probably won't in September. ”

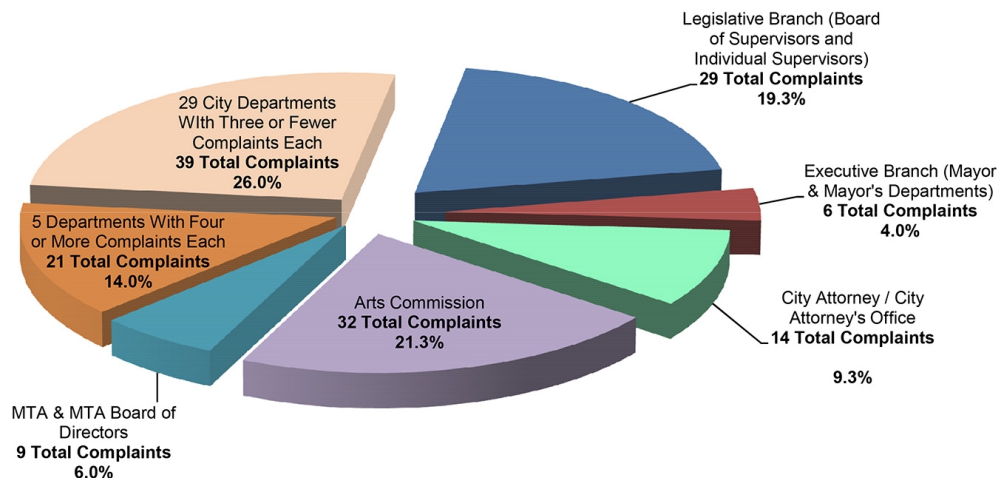
“ The pie chart below shows, during calendar years 2012 and 2013 there were a total of 150 Sunshine complaints filed, 29 of which involved San Francisco Legislative Branch (Board of Supervisors) and six of which involved the Executive Branch (the Mayor and his various sub-departments). ”

“ Between the seven City departments plus the Legislative and Executive Branches, fully 79 of the 150 complaints (53%) were against approximately just nine City departments. ”

San Francisco Sunshine Ordinance Complaints Filed

Calendar Years 2012 and 2013
(150 Total Complaints)

The Executive and Legislative Branches accounted for almost 25% (35) of all complaints filed; add in the City Attorney's Office, and the three entities accounted for one-third of all complaints — 49 of the 150 filed.



Note: The five City Departments with four or more complaints each across 2012 and 2013 include the Public Library / Library Commission, the City Controller's Office, the Community Housing Partnership, the Department of Public Works, and the Recreation and Parks Department.

Source: Sunshine Ordinance Task Force Administrator's Sunshine Complaint Log Book 2012 and 2013

While the Ethics Commission now seems to be taking back some of its oversight responsibilities and appear to be reigning in Mr. St. Croix somewhat, the problem of Task Force member David Pilpel violating *ex parte* communications restrictions remains. Both the Ethics Commission and the Sunshine Task Force need to reign in Pilpel, and implement Civil Grand Jury recommendations.

“ The City desperately needs to increase budgeted support to the Sunshine Task Force. ”

The City desperately needs to increase budgeted support to the Sunshine Task Force. After all, budgeting \$200,000 to \$300,000 to support the Task Force annually, while providing \$2.6 million to the Ethics Commission, is clearly inequitable.

Monette-Shaw is an open-government accountability advocate, a patient advocate, and a member of California's First Amendment Coalition. He received the Society of Professional Journalists–Northern California Chapter's James Madison Freedom of Information Award in the Advocacy category in March 2012. Feedback: <mailto:monette-shaw@westsideobserver.com>.