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Advancing Open Government in San Francisco

Four Major Sunshine Victories

by Patrick Monette-Shaw

In a democracy predicated on the principle that citizens have inherent rights to know what their government is doing on their behalf, a City Librarian shouldn't be permitted to commit perjury by concealing violations of laws regulating disclosure of financial conflicts of interest. Nor should an Ethics Commission be permitted to hand itself a blanket exemption to avoid hearing complaints brought against its own staff and its Commissioners.

Nor should a Public Health Commission be permitted for over two decades to omit meaningful agenda item descriptions of discussions and actions it plans to take during its meetings. Nor should the same Ethics Commission be permitted to flout orders to produce public records required by State and local laws, and in the process rack up hundreds of thousands of dollars in wasted expenses during preventable Superior Court lawsuits.

> **"These four open government violations represent the epitome of utter contempt of voters, contempt for open government, and clear contempt of the public's right to know."**

These four open government violations represent the epitome of utter contempt of voters, contempt for open government, and clear contempt of the public's right to know. These four violations — although not a whole host of other San Francisco government secrecy — have been stopped in San Francisco by another small group of dedicated citizens.

All four of the open government victories were against three Department Heads — at the Public Library, Department of Public Health, and the Ethics Commission — who all report to Mayor Ed Lee, and against the full Health Commission. The three department heads appear to collectively believe they're allowed to brazenly violate State and local laws, or are above the law. There will always be Sunshine Ordinance violators, because some City employees believe they may have something to gain from secrecy and obscuring the truth, and are motivated to do so.

Citizen's shouldn't have to file costly Superior Court lawsuits to assert their rights, and then be told by Deputy City Attorney's in court filings that San Francisco voters are powerless to adopt laws requiring that our local government officials disclose public records when the records merely involve communications with the City Attorney. That's a novel legal proposition, but it's thought to be unfounded and untenable.

The four open-government victories recently won occurred due to combined efforts of ten members of San Franciscans for Sunshine, including Peter Warfield, Executive Director of the Library Users Association; James Chaffee, a democracy advocate and former chair of the Sunshine Ordinance Task Force; Ray Hartz, Jr., Director of San Francisco Open Government; this columnist and Dr. Maria Rivero, a former senior physician specialist at Laguna Honda Hospital; Bruce Wolfe, a former Vice Chairperson of the Sunshine Ordinance Task Force; Derek Kerr, MD, the former LHH physician terminated for filing multiple whistleblower complaints involving the Department of Public Health and Laguna Honda Hospital; others; and most significantly, by Allen Grossman, a retired lawyer and prominent expert on San Francisco's Sunshine Ordinance and State records law who is being represented by lawyer Michael Ng, another expert and full-time litigator.

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These activists performed essential, crucial roles bringing these four violations to light. Without their time-consuming hard work, energy, intelligence, and specific background knowledge to make sense of things, these "wins" might never have happened had it not been for dedicated, active watchdogs.

The chain of recent Sunshine victories presented below chip away at the secrecy preferred by career politicians in San Francisco's "City Hall Family" that is driven in large measure by the flawed legal advice provided by City Attorney Dennis Herrera and his top-heavy team of approximately 176 Deputy City Attorney's — who cost taxpayers a staggering $27 million in salaries alone in 2012, excluding fringe benefits of 30% to 40% — and who all too often appear to be struggling mightily against open government, and by extension, against San Franciscans.

City Librarian Fined by the FPPC

During its regularly-scheduled meeting on September 19, 2013, California's Fair Political Practices Commission (FPPC) accepted a written admission of guilt by San Francisco City Librarian Luis Herrera for his failure "to report gifts received from the Friends of the San Francisco Public Library on Annual Statements of Economic Interests [known as Form 700's] for calendar years 2009, 2010, and 2011."

The filing regulations for the Form 700 reports and accompanying statements stipulate the forms shall be signed under penalty of perjury, verified by the filer that they have used all reasonable diligence in preparation of the statements, and that to the best of their knowledge are "true and complete" financial statements.

Government Code §87300 — which resulted following adoption of California's Political Reform Act of 1974 — states, "Every person who signs and verifies any report or statement required to be filed under this [act] which contains material matter which he knows to be false, is guilty of perjury." Herrera was fined just $200 for each of three counts of violating disclosure laws, for a total of just $600, a small slap on the wrist for having failed to accurately report financial conflicts of interest he was required to report on the Form 700's under penalty of perjury.

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Mr. Herrera — who serves as department head of a City Department and earned $218,387 in calendar year 2012 — was forced to formally acknowledge that he had unlawfully failed to report financial contributions he received from the Friends of the Library. Why have we heard not one peep about Luis Herrera's fine and unethical behavior out of his boss, San Francisco Mayor Ed Lee?

The FPPC complaint, filed by public library watchdog James Chaffee in April 2013, alleged that Herrera had repeatedly filed Form 700's declaring he had no donations to report on his Statements of Economic Interest when, in fact, research by whistleblower Ray Hartz and James Chaffee revealed Mr. Herrera had received at least $130,000 from the Friends in two of the three reporting periods. Both Chaffee and Hartz are long-time library advocates. Peter Warfield also provided research assistance, and widely publicized the FPPC case against Herrera.

It's not known why Mr. Herrera needed to augment his $218,387 City salary by accepting, but failing to report, significant gifts from the Friends of the Library. But it illustrates that city contractors and non-profit "Friends of" City department organizations are all too willing to buy influence at City Hall.

The FPPC's order against Herrera — referred to as a "stipulation" — didn't state how much in unreported gifts he received, but research by Hartz showed that the Friends of the Library had provided Herrera $66,000 in 2008–2009 and $65,000 in 2009–2010 for a "City Librarian's Fund."

Chaffee's previous research of the Friends of the Library's IRS non-profit tax reports and official reports of donations posted on the library's website, reveals that the Friends of the Library raised $36 million in the decade between fiscal years 2000–2001 and 2009–2010, but only donated a paltry $4 million to the library during the same period.

"Mayor Lee's silence on Herrera's FPPC fine is as troubling as the Mayor's refusal to remove Library Commission president Jewelle Gomez, who was found by both the Sunshine Ordinance Task Force and the Ethics Commission in July 2011 as having violated the Sunshine Ordinance."

Mayor Lee's silence on Herrera's FPPC fine is as troubling as the Mayor's refusal to remove Library Commission president Jewelle Gomez, who was found by both the Sunshine Ordinance Task Force and the Ethics Commission in July 2011 as having violated the Sunshine Ordinance. The Ethics Commission recommended to Lee that he remove Gomez, a recommendation that our Mayor has studiously refused to implement for now over two-and-a-half years. Perhaps the Mayor is counting on seeking political support from Friends of the Library, Luis Herrera, Ms. Gomez, and other helpful library employees when he seeks re-election to a second term.

Preliminary research of just 12 of the approximate 60 City Departments reveals that just 611 (barely 5%) of 12,082 City employees are required to file Form 700's detailing potential financial conflicts of interest, but only 34 (5.5%) of the 611 are required to file their Form 700's with the Ethics Commission that the FPCC and citizens can access easily on the Internet. [**Editor:** The City had 36,761 employees in 2012, of which the 12,082 only represent roughly one-third.] The remaining 577 of the 611 employees (94.5%) are only required to file their Form 700's with their employing City Department — where they are harder to uncover, since not required to be posted on departmental web sites. It's unknown how many other Form 700 filers under-report financial interests on their Form 700's, as Luis Herrera so blatantly did.

"The provision Ethics staff desperately wanted to suddenly alter involved referrals of complaints to the Ethics Commission that allege Ethics staff, Ethics Commissioners, or its Executive Director, John St. Croix, may have violated provisions of the Sunshine Ordinance."

But FPPC complaints can, and do, lead to fines against miscreant Department Heads such as City Librarian Herrera.

Ethics Tried Anointing Itself Sunshine-Exempt

Four days after the FPPC ruling against Luis Herrera, San Francisco's Ethics Commission blatantly attempted to exempt itself from a key provision of our local Sunshine Ordinance, but its proposal was stopped dead in its tracks on September 23 following testimony from members of a small group of thoughtful committed citizens known as San Franciscans for Sunshine, previously referred to affectionately as the "Sunshine Posse."

On Wednesday, September 18, an "interested persons" e-mail notice was sent by the Ethics Commission, announcing proposed changes to the *Commission's Regulations for Violations of the Sunshine Ordinance ("Regulations")* that Ethics staff claimed suddenly required modification just nine short months following implementation of the new Regulations on January 25, 2013.

The provision Ethics staff desperately wanted to suddenly alter involved referrals of complaints to the Ethics Commission that allege Ethics staff, Ethics Commissioners, or its Executive Director, John St. Croix, may have violated provisions of the Sunshine Ordinance.

"St. Croix admitted that there have only been 'three or four' complaints alleging that Ethics Commission staff had violated the Sunshine Ordinance in the 20 years since it was adopted by the Board of Supervisors."

Brazenly, St. Croix — who earned just $144,288 in 2012, as one of the lowest-paid City department heads — tried to muscle through the Ethics Commission's approval process on September 23 changes to its regulations that would have granted blanket immunity and an open-ended exemption for any complaint alleging that Ethics Commissioners or Ethics staff had violated the Sunshine Ordinance, along with a provision to simply return any referred complaint against the Ethics Commission to the originating referral entity, and take no further action on any such complaint.

St. Croix also wanted to change Ethics' rules that if a complaint is filed directly with the Ethics Commission (as opposed to a formal complaint being referred from the SOTF for enforcement) alleging violations of the Sunshine Ordinance by Ethics staff or commissioners, that the staff would simply inform the complainant of other legal remedies under State and local law — such as to the District Attorney, State Attorney General, or costly Superior Court lawsuits — and would also take no further action.

St. Croix's lame rationale was that "it has been a challenge to find other Ethics agencies that are willing to handle them in the Commission's stead. To avoid imposing such work on other Ethics agencies and to avoid any appearance of possible conflict, staff believes that informing the Complainant to pursue other available remedies would be the best measure."

Under questioning from his own five-member Ethics Commissioners, only four of whom were present on September 23, St. Croix admitted that there have only been "three or four" complaints alleging that Ethics Commission staff had violated the Sunshine Ordinance in the 20 years since it was adopted by the Board of Supervisors in August 1993 and amended by voters in November 1999. Given the low volume of complaints referred to Ethics alleging Sunshine

violations by Ethics staff, there is rarely any "burden" imposed on other Ethics agencies, and Ethics has only had to face the "challenge" of finding other jurisdictions to hear complaints involving our own Ethics Commission just a handful of times.

Three Cases Against Ethics Commission Outsourced

One complaint against Ethics staff was filed jointly by Ethics Commission staff members Kevin De Liban and Oliver Luby in early 2004 against the Ethics Commission's then Executive Director, Ginny Vida, and Deputy Director Mabel Ng. Vida and Ng had ordered Luby — in violation of State law and San Francisco's Sunshine Ordinance — to destroy public records that had been mistakenly submitted to Ethics by the 2004 Newsom Mayoral Swearing-In Committee.

The documents involved campaign finance issues potentially damaging politically to newly-elected Mayor Gavin Newsom and his campaign treasurer, Jim Sutton. The documents revealed large payments under the heading "San Francisco 2004 Swearing-In Committee" to more than two dozen individuals, most of them then-salaried employees of Newsom's mayoral campaign, several of whom reportedly worked for Newsom's initial administration. They also showed a $54,000 payment to Newsom's mayoral campaign.

Ms. Vida eventually deleted the documents from Luby's computer, which most likely amounted to a misdemeanor or felony, never pursued against her.

The Ethics Commission forwarded Luby's complaint to the Oakland Public Ethics Commission's executive director for investigation, who eventually ruled against him. Five years later, Luby filed a Whistleblower complaint in May 2009 on an unrelated matter, which the City Controller eventually upheld; he had filed two other whistleblower complaints. But subsequently, Luby faced retaliation and was terminated in June 2010.

A second complaint against Ethics staff thought to have been outsourced to another jurisdiction was an anonymous complaint also filed in 2004 against Ethics' Deputy Director Mabel Ng, alleging that Ethics had proceeded with a special meeting of its Commission in violation of Sunshine Ordinance noticing requirements. The illegal special meeting appears to have paved the way for former City Supervisor Tony Hall's appointment as director of the Treasure Island Development Authority, which in turn allowed the Mayor's office to appoint Sean Elsbernd to Hall's former seat on the Board of Supervisors — and allowed Elsbernd to register for the November 2004 election as an incumbent, shortening the deadline for other candidate's to challenge Elsbernd, which effectively cleared the field for Elsbernd's first election.

A third complaint against Ethics staff outsourced to another jurisdiction involved a Sunshine Ordinance Task Force complaint filed on March 6, 2011 titled *Patrick Monette-Shaw vs. Ethics Commission* (Case 11014), which sought to obtain the Ethics Commission's closing memo of the Laguna Honda Hospital patient gift fund whistleblower complaint and the Ethics Commission's investigative file. The complaint also involved the failure to release correspondence between the City Controller's whistleblower program and the Ethics Commission, since Ethics and the City tried to assert that a so-called "official information" privilege applied to the entire file they wanted to keep totally secret.

"This illustrates that Ethics previously had not had a conflict-of-interest accepting referrals that alleged misconduct by Ethics' own staff, and illustrates there is rarely any 'burden' imposed on other Ethics agencies."

But when the SOTF ruled in my favor on May 18, 2011 and referred the case to Ethics for enforcement, it was then outsourced not to an Ethics Commission or Sunshine body in another jurisdiction, but to San Jose's City Attorney's Office, which ruled against my complaint on September 6, 2012, 18 months after the complaint was filed in 2011.

All three of the Sunshine complaints filed against Ethics staff were found by the Sunshine Ordinance Task Force to have had merit, and each case was referred to Ethics for enforcement, but each of the three cases were outsourced to other jurisdictions. This illustrates that Ethics previously had not had a conflict-of-interest accepting referrals that alleged misconduct by Ethics' own staff, and illustrates there is rarely any "burden" imposed on other Ethics agencies, since it has occurred just three times.

Ethics' Sought Get-Out-of-Jail-Free Card

During public testimony on September 23, it became clear that St. Croix's proposal to grant a blanket exemption to Ethics to refuse accepting Sunshine complaints involving Ethics staff would have amounted to a get-out-of-jail-free card, but only for Ethics as the sole City department awarded an exemption from Sunshine. Former Laguna Honda Hospital physician Dr. Derek Kerr — who was eventually awarded a $750,000 wrongful termination settlement award regarding his dismissal for exposing the raid of LHH's patient gift fund — testified "Sunshine complaints against Ethics staff are rare. There's no need to dodge them." Kerr also noted there have only been three complaints made against Ethics' staff since the Sunshine Ordinance was adopted.

"St. Croix's proposal to grant a blanket exemption to Ethics to refuse accepting Sunshine complaints involving Ethics staff would have amounted to a get-out-of-jail-free card, but only for Ethics as the sole City department awarded an exemption."

Former Sunshine Ordinance Task Force (SOTF) member Bruce Wolfe testified that the proposal to exempt Ethics staff would create a slippery slope, the Ethics Commission should not cherry pick which Sunshine complaints it will accept, and should not exempt Ethics staff, since no other City employee and no other City department is granted the same privilege.

Retired lawyer Allen Grossman testified that there is no exemption in the Sunshine Ordinance for the Ethics Commission, its Director, or its staff to be granted a blanket waiver. Grossman stated that the California Constitution governs, and the Ethics Commission could not adopt this exemption without violating both the Sunshine Ordinance and the State Constitution.

For my part, I testified that it is Ethics' responsibility to investigate Sunshine referrals sent to Ethics for enforcement involving cases against their own co-Commissioners.

Following thoughtful testimony from members of San Franciscans for Sunshine, the Commission sheepishly took no action and rejected St. Croix's proposed changes, quietly agreeing on September 23 not to adopt the proposed blanket waiver, handing St. Croix an embarrassing public defeat.

St. Croix has been the public face of the City's gluttonous attempts to scuttle open government ever since his appointment as Executive Director in 2004. During the past decade, he has been perceived as being instrumental to the City's efforts to thwart Sunshine and protect high-ranking City employees, often working hand-in-glove with City Attorney Dennis Herrera to implement government secrecy, rather than government transparency.

So it really comes as no great surprise that after the Ethics Commission went in to closed session on September 23 — to conduct St. Croix's annual performance review following its rejection minutes before of his bald attempt to hand Ethics broad blanket immunity from hearing complaints against Ethics staff — the meeting minutes indicate that when the Commissioners reconvened in open session, they attempted to smooth St. Croix's ruffled feathers.

Ethics' Vice-Chair, Paul Renne — husband of former City Attorney Louise Renne, who by report despises San Francisco's open-government Sunshine Ordinance even more than her successor, Dennis Herrera — stated that "it had been a rough evening on staff," apparently including on poor Mr. St. Croix. Renne stated on behalf of other Ethics Commissioners that he didn't want staff or St. Croix to take the public criticism to heart, and it isn't the way Ethics Commissioners feel. Renne suggested that the accusations [made during public comment] "were all unfounded comments." Ethics Chairperson Beverly "A Deer Caught in the Headlights" Hayon agreed with Renne; she congratulated St. Croix on his hard work and stated he shouldn't "take the comments personally or to heart."

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Would that be St. Croix's decade of hard work blocking access to public records, his hard work dismissing all 39 Sunshine cases the Sunshine Task Force had referred to Ethics for enforcement, and his hard work protecting City department heads found violating the Sunshine Ordinance?

As Paul and Beverly tried to re-fluff St. Croix's mottled feathers, both of them more than likely had to have known (unless St. Croix hadn't shared news with the pair) that just five days earlier, lawyer Allen Grossman had filed his second Superior Court lawsuit on September 17 naming both St. Croix and the Ethics Commission as respondents for their failure to produce public records requested on October 3, 2012 that St. Croix appears to have improperly withheld, discussed below.

To be fair, when Hayon and Renne sought to reassure poor Mr. St. Croix on September 23 following closed session, although they may have known Grossman had filed his second lawsuit against Ethics, they had no way of knowing that a month later the Superior Court would rule on October 25 in Grossman's favor, largely over the same issue of improper withholding of records raised in Grossman's 2010 lawsuit. So much for St. Croix's "hard work" of withholding records, hard work rightfully overturned by a second Superior Court judge, who ignored St. Croix's disheveled feathers.

"Ethics' Vice-Chair, Paul Renne stated 'it had been a rough evening on staff,' apparently including on poor St. Croix. Renne suggested that accusations [made during public comment] 'were all unfounded comments'."

Superior Court's First Rejection of St. Croix's "Hard Work"

When Allen Grossman's first Superior Court case — *Allen Grossman vs. San Francisco Ethics Commission, John St. Croix, and Richard Mo* — was settled in Grossman's favor in February 2010, it represented a reversal of the Ethics Commission's assertion of exemptions for its investigative records and future Ethics Commission investigative files. His case in 2010 had asserted that none of the citations offered by the City Controller and the Ethics Commission had provided a valid exemption to the California Public Records Act permitting the withholding of previous records then sought by Grossman. Grossman was awarded $24,900 in legal fees and costs, likely because if the amount had surpassed $25,000, it would have required Board of Supervisors approval, which "negative publicity" the City wanted to avoid at all cost.

The City Attorney spent an additional $13,062 fighting Grossman's first Superior Court case in 2010, pushing the tab to nearly $40,000. In the end, the Ethics Commission was required to provide Grossman with approximately 150 documents that had been improperly withheld, most of which were the Ethics Commission's un-redacted and complete investigative files on approximately 14 cases referred by the SOTF to Ethics for enforcement, which Ethics had simply dismissed as unsubstantiated and refused to release, until Grossman filed suit in Superior Court, which concluded St. Croix had to cough up the records.

It's clear Paul Renne, Bev Hayon, and Herr St. Croix all need to be replaced at once, clueless about the abhorrent blanket exemption St. Croix attempted to cram through, stopped by citizen activists. Unless this trio wants to invite another Superior Court lawsuit challenging blanket Sunshine exemptions potentially granted to Ethics to skirt the law.

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Health Department Finally Ordered Into Sunshine Compliance

Another open-government victory occurred on October 2 for two concerned citizens who had filed a Sunshine complaint against Department Head-level staff: Health Commission President Sonia Melara and Director of Public Health Barbara Garcia (who earned $259,921 in calendar year 2012). Melara and Garcia, per the Health Commission's By-Laws, are responsible for generating the agendas for Health Commission meetings. The complaint also named the full Health Commission as Respondents.

The Sunshine Complaint — Case # 13021, *Patrick Monette-Shaw/Maria Rivero, MD vs. Public Health Commission, et al.* — was filed on April 18, 2013, alleging that for two decades, the Health Commission had violated both San Francisco's local Sunshine Ordinance and the State's Brown Act, both of which laws require that meaningful agenda item descriptions be provided for each agenda item in order to alert members of the public of important policy

discussions and proposed actions that may be discussed during any given meeting, so citizens can decide whether an agenda item is of sufficient interest that they might want to attend a scheduled meeting.

The basis of the *Monette-Shaw/Rivero* complaint featured a deficient agenda notice for the Health Commission's April 2, 2013 meeting, at which former LHH physician Derek Kerr was scheduled per a court order to receive a public apology for his wrongful termination and retaliation lawsuit, but which agenda had lacked any notice whatsoever that Kerr's public apology was to take place on April 2.

> **"For two decades, the Health Commission had violated both San Francisco's local Sunshine Ordinance and the State's Brown Act, both of which laws require that meaningful agenda item descriptions be provided for each agenda item."**

As egregious and unprecedented as it was for DPH to violate terms of Kerr's legal settlement agreement by failing to provide adequate agenda notice of the public apology mandated by Court order, thousands of agenda items over the past two decades have also contained only agenda topic titles. Lacking meaningful agenda descriptions, thousands of San Franciscans were deprived of knowing what their government via the Health Commission was doing, and to decide whether they might want to attend any given Health Commission meeting.

The Sunshine complaint should have been considered and heard by the Sunshine Task Force within 45 days from April 18; instead, the hearing never occurred until October 2, fully 167 days after it was first filed. Just 12 days before the Task Force hearing, Ms. Melara finally got around to providing a response to the complaint on behalf of the Health Commission on September 20 — fully five months after the complaint was filed.

> **"As egregious and unprecedented as it was for DPH to violate terms of Kerr's legal settlement agreement, thousands of agenda items over the past two decades have also contained only agenda topic titles."**

"The Way We've Always Done It"

Comically, Melara tried to assure the Sunshine Task Force that the reason the Health Commission had failed to comply with both the Brown Act and the Sunshine Ordinance was because "that's the way we have always done it," as if past practices of how the Commission had always been done it could excuse violating the clear intent of both laws, and as if "past practices" can "trump" City and State laws to the contrary.

Melara hedged her bets, however — apparently with Ms. Garcia's tacit approval — saying in her response that if the Task Force ruled that the Health Commission had to begin including meaningful descriptions of proposed legal settlements, the Health Commission would certainly consider changing its past practices, but only by cherry-picking among agenda items it was willing to disclose.

> **"Comically, Melara assured the Sunshine Task Force that the reason the Health Commission had failed to comply with both the Brown Act and the Sunshine Ordinance was because 'that's the way we have always done it'."**

What Melara didn't seem to understand was that both laws are very clear that ***every*** agenda item — not just legal settlements — have to contain a meaningful agenda item description. Melara, Garcia, and each of the Health Commissioners sign annual statements under the penalty of perjury that they have read the Sunshine Ordinance, which clearly states the requirements for meaningful descriptions for each agenda item. Ostensibly, the intent is that they not only read, but fully comprehend, the laws they are required to read under penalty of perjury, and incorporate while performing their official duties.

In an "instructional memo" sent to the Task Force on September 26 just four working days before the October 2 Task Force hearing, Deputy City Attorney Celia Lee — assigned to provide legal advice to the Sunshine Task Force — appeared to support every allegation that had been raised in this complaint.

Of the 108 agenda items listed on the Commission's 13 meeting agendas between January and October 2, 2013, 69 percent contained just agenda titles, with no meaningful descriptions at all. Of those 108 items, 22 were action-only items, 12 were discussion-only items, and 55 items involved discussion with possible action. Among agenda items since January that were never provided a meaningful description were topics addressing "Community and Public

Health Committee," the "Community Health Improvement Plan," the "Community Independence Project," and "Proposed Amendments to San Francisco Health Code," all weighty topics, among others lacking any meaningful agenda descriptions.

Given notice in April 2013 of the Sunshine complaint against them, Melara, the Health Commission, and Director of Public Health Garcia made no effort during the intervening five months to begin correcting the problem. They just kept following their "past practice" behavior with impunity, even after having been placed on notice they were violating State and local law, apparently unwilling to change past practices unless ordered to do so by the Sunshine Ordinance Task Force.

"Melara, the Health Commission, and Director of Public Health Garcia made no effort during the intervening five months to begin correcting the problem."

After the SOTF ruled unanimously on October 2 that Garcia, Melara, and the Health Commission had violated, and were continuing to violate, the Sunshine Ordinance and Brown Act, the Health Commission finally started publishing agenda item descriptions. Unfortunately, the new agenda descriptions are weakly-worded and may remain ineffectual.

Second Superior Court Victory: Grossman vs. St. Croix

The *Westside Observer's* November 2013 editorial, "*Court to Ethics' St. Croix: Cough Up the Records*," announced Mr. Grossman's second Superior Court victory against St. Croix and the Ethics Commission. The editorial noted that the Court ruled Grossman, not Ethics, was right on the law. This was the second time Grossman prevailed in Superior Court against St. Croix and the Ethics Commission.

This time, the withheld records involve the *Ethics Commission's Regulations for Violations of the Sunshine Ordinance ("Regulations")*, which it adopted in November 2012 for implementation on January 25, 2013,

The Sunshine Task Force issues what are known as "Orders of Determination," ruling on the facts in Sunshine public access disputes brought before it. The Orders of Determination are frequently forwarded to the Ethics Commission for enforcement (although the Ethics Commission has very rarely enforced them, and instead, wrongly re-adjudicates the Sunshine Complaints all over again, and has dismissed nearly 100% of all referrals for enforcement, the referral of Library Commission president Jewelle Gomez to Mayor Lee being the rare exception).

For years, Ethics had used its separate *Ethics Commission's Regulations for Investigations and Enforcement Proceedings*" — regulations that were developed to address campaign finance and disclosure laws — to rule on access to public meetings and access to public records violations. Grossman and other Sunshine advocates had long argued that those regulations didn't govern Sunshine Ordinance open meetings and open records enforcement violations, and that the Ethics Commission needed new, separate regulations tailored to Sunshine matters, since the latter deal with public meeting access and public records issues, not campaign finance issues.

In 2009, the Ethics Commission finally agreed, and began drafting new stand-alone regulations to address referrals for enforcement from the Sunshine Task Force and complaints filed directly with the Ethics Commission alleging willful violations of the Sunshine Ordinance's public access provisions.

"For years, Ethics had used separate regulations developed to address campaign finance and disclosure laws — to rule on access to public meetings and access to public records violations. Sunshine advocates had long argued those regulations didn't govern Sunshine Ordinance enforcement violations."

Four years later, the Ethics Commission still won't release related records, including draft versions of the proposed regulations and communications with the City Attorney's Office. Ethics initially worked with the Sunshine Task Force and held several joint meetings between the two bodies, seeking input to the new regulations. But that suddenly changed in September 2012 when the Ethics Commission published notice that its September 24, 2012 meeting would discuss yet another revised draft of the proposed regulations that had not been vetted with the Sunshine Task Force. Sunshine advocates objected to many of the proposed changes on September 24, but the Ethics Commission eventually adopted its new regulations in November 2012.

In an effort to seek additional information about the September 2012 final draft, Grossman placed a records request on October 3, 2012 seeking all prior drafts and the final version of the September 14 draft, and also requested the Ethics Commission's staff report. When the Ethics Commission responded to the records request on October 12, Grossman was notified that the Commission was withholding an untold number of other documents in their entirety, citing attorney-client privilege and two types of attorney work-product protections.

Because St. Croix had failed to identify each of the withheld public records, failed to provide a written citation to justify each withholding, and Ethics' assertion of privilege, Grossman filed a formal complaint with the SOTF on November 19, 2012. In response, during a SOTF hearing St. Croix again claimed the attorney-client privilege and attorney work-product protections, and asserted that merely citing the relevant code sections on a blanket, not case-by-case, basis was sufficient to satisfy compliance with requirements to provide written justification for each record withheld. But St. Croix was wrong on the law.

"Grossman was forced to sue St. Croix and the Ethics Commission for a second time in Superior Court to gain access to the improperly withheld records."

The Task Force held an extended hearing on Grossman's complaint during its June 5, 2013 meeting and issued its Order of Determination on June 24, ruling that St. Croix had violated two sections of the Sunshine Ordinance by improperly withholding records subject to disclosure. The Task Force ordered St. Croix to produce the records to Grossman. To date, St. Croix has failed to comply with the SOTF's Order of Determination.

Forced Into Superior Court

So Grossman was forced to sue St. Croix and the Ethics Commission for a second time in Superior Court to gain access to the improperly withheld records. In his initial 16-page *Verified Petition for Writ of Mandate* filed in Superior Court on September 17, 2013, Grossman asserted that none of the records he had requested were exempt from disclosure under either the California Public Records Act (CPRA) or under San Francisco's Sunshine Ordinance. [**Note:** A Writ of Mandate is a court order to a government agency to follow the law by correcting its prior actions or ceasing illegal acts. When a Writ is ordered, they are typically effective immediately.] St. Croix's refusal to provide the requisite justification for withholding and his misguided assertion of "privilege," also constituted a violation of law, since he and the Ethics Commission had a nondiscretionary, mandatory ministerial duty to comply with Grossman's records request, and to comply with the Sunshine Task Force's lawful Order of Determination.

"The City Attorney's Office submitted a 20-page '*Respondents Opposition*' response to Grossman's lawsuit. It's the worst legal filing this columnist has ever had the displeasure of reading."

In its Superior Court response, the City Attorney's Office submitted a 20-page *Respondents Opposition to Petition for Writ of Mandate*, on October 9, 2013 authored by Deputy City Attorney Andrew Shen.

It's the worst legal filing this columnist has ever had the displeasure of reading, since it starts out indicating Grossman's case "raises the question of whether a municipality's voters acting in their legislative capacity may, by ordinance, override the laws of attorney-client privilege and work product doctrine set forth in state statues and rules of professional conduct incorporated into a City charter."

"The City Attorney ignored that seven states have already abolished government attorney-client privilege, particularly when it only involves communications between a government attorney and his government client."

That's complete rubbish — of course voters can! — but Shen's *Opposition* brief quickly went downhill from there. He painted a picture that the City Attorney couldn't fulfill his obligations to protect client confidentiality if a "mere" ordinance could bar City officials from asserting attorney-client privilege or from asserting attorney work-product privilege in a "broad swath" of unrelated legal matters.

Shen wailed that the City Attorney's ability to fulfill his mission of advising City officials would be seriously compromised. Shen wasted 10 of his 20 pages addressing attorney-client privilege and attorney work-product privilege issues to argue that voters can't enact restrictions on the City Attorney, ignoring that seven states have already abolished government attorney-client privilege, particularly when it only involves *communications* between a government attorney and his government client.

"Shen admitted that St. Croix had withheld 28 documents from Grossman for over a year, and announced that upon further review, four of the 28 — 14.3 percent — were 'determined not to be subject to' either attorney-client privilege or attorney work-product privilege."

The reason these states have abolished government attorney-client privilege is due in large part to the diminished expectation of confidentiality in the public sector, and democratic values disfavoring secrecy in government. There is strong evidence — as St. Croix and Herrera must surely know — that suggests attorney-client privilege is not a necessity for effective *communication* between government officials and their attorneys, undermining any rationale that invoking this privilege in a government context is ever justified.

When the "client" is a government body, bestowing this privilege to it appears particularly perverse, since the privilege is then used all too often to withhold information from the very citizens the government body represents.

The strong public interest in seeking honest government and exposing wrongdoing by public officials is ill-served by allowing attorney-client privilege in inquires into actions of public officials. Many believe allowing City Attorney's to use attorney-client privilege as a shield against production of public records is a gross misuse of public assets.

"Shen's separate *Declaration* effectively admits that none of the withheld records involved work-product; it appears they are simply attorney-client communications. Shen's *Declaration* says nothing about the work product doctrine."

Shen admitted that St. Croix had withheld 28 documents from Grossman for over a year, and announced that upon further review, four of the 28 — 14.3 percent — were "determined not to be subject to" either attorney-client privilege or attorney work-product privilege. The four documents were provided to Grossman on the same date Shen filed the City Attorney's response to Grossman's lawsuit in Court. Had Grossman not sued, St. Croix would have gotten away with withholding the four documents that weren't even legally privileged.

The "Work-Product" Canard

Indeed, Shen's separate *Declaration* effectively admits that none of the withheld records involved work-product; it appears they are simply attorney-client communications. Of the remaining 24 documents withheld, 15 documents, mostly e-mails, involve requests from the Ethics Commission staff to the City Attorney's Office for legal advice on the proposed Ethics regulations. The remaining nine appear to be City Attorney responses to those requests providing advice regarding the proposed regulations, including one dated May 6, 2010 that analyzed legal issues implicated by the Commission's proposed Sunshine regulations.

"Shen launches an all-out attack on Sunshine Ordinance §67.24(b)(1)(iii), which simply states that any City Attorney communications providing 'advice on, compliance with, analysis of, or an opinion' concerning CPRA, the Brown Act, San Francisco's Ethics Code, or the Sunshine Ordinance are public records subject to disclosure."

And Shen's *Declaration* — separate from his *Respondents Opposition* brief — says nothing about the work product doctrine, even though he goes on and on about work product in the *Opposition* brief. Shen's *Declaration* impliedly admits that the 24 documents that remain in dispute are subject to the attorney-client privilege, so none may be subject to work-product privilege.

Then Shen launches into an all-out attack on Sunshine Ordinance §67.24(b)(1)(iii), which simply states that any City Attorney communications providing "advice on, compliance with, analysis of, or an opinion" concerning CPRA, the Brown Act, San Francisco's Ethics Code, or the Sunshine Ordinance are public records subject to disclosure. Shen claims this section "purports to ***bar***," the City from asserting attorney-client privilege and wrongly claims the City Attorney would be

prohibited from providing legal advice to City officials, when in fact, this section ***only*** stipulates that any such legal advice to City officials are, by definition, public records that must be disclosed. It doesn't prohibit the City Attorney from anything — other than prohibiting ***withholding*** the records from disclosure.

But Shen twisted §67.24(b)(1)(iii) into something it is not, and railed throughout the remainder of his *Opposition* brief that the section attempts to "alter or limit the provisions of" the City Charter, and that this section of the Sunshine Ordinance cannot be enforced. In the Court *Order* handing Grossman his second victory against St. Croix, Judge Goldsmith denied Shen's request to strike down §67.24(b)(1)(iii), noting that this issue was not properly before the Court in Grossman's motion for writ of mandate.

"Shen twisted §67.24(b)(1)(iii) into something it is not. §67.24(b)(1)(iii) only stipulates that any such legal advice to City officials are, by definition, public records that must be disclosed."

Attorney Ng to the Rescue

In stark contrast to Shen's misguided and rambling *Opposition* brief, Grossman's lawyer Michael Ng submitted a brilliant rebuttal in his 14-page *Petitioner's Reply in Support of Verified Petition for Writ of Mandate*.

Ng began by noting Shen's claim that voters are powerless to adopt laws requiring that public officials disclose public records involving communications with the City Attorney, is unfounded, and untenable; Ng notes voters are the ultimate authority and can exercise plenary power over the City's legislative affairs. It's clear that Sunshine §67.24(b)(1)(iii) says City Attorney communications — from the outset — are not confidential, and that communications that were never confidential cannot be subject to the attorney-client privilege.

Ng then noted CPRA expressly authorizes local governments to adopt requirements like §67.24(b)(1)(iii) providing greater access to public records in order to shrink the islands of privacy [in a sea of government secrecy], by precluding San Francisco from invoking exceptions when the public records concern a narrow set of law relating to public records access itself. He also notes San Francisco voters expressly approved these "enhanced rights of public access to information and records."

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Ng observed that the City — by extension City Attorney Dennis Herrera and St. Croix — has not challenged other provisions of §67.24 that also preclude San Francisco agencies from asserting other CPRA exemptions. It's clear to most observers that St. Croix and Dennis Herrera are not so concerned with §67.24 overall, as they suddenly are with the implications of §67.24(b)(1)(iii). Ng rightfully asserted Shen's contention that the latter citation would prevent Herrera from carrying out his City Attorney duties is a gross exaggeration, since that section merely provides that City Attorney communications regarding open government laws remain accessible to the public.

Why the City is suddenly seeking to strike §67.24(b)(1)(iii) from San Francisco's administrative code 20 years after it was added to the Sunshine Ordinance in August 1993 and adopted by voters in November 1999, isn't known. Observers suspect the City now wants it struck down simply because Grossman appears to be the first San Franciscan to have successfully sued for its enforcement in Superior Court. As long as nobody had sued for enforcement, the City appears to have let §67.24(b)(1)(iii) stand for 20 years.

St. Croix and Herrera brazenly asked the Superior Court to strike it down when Grossman found the chutzpah — referred elsewhere to as the "audacity of hope" — to challenge the shameless pair of Herrera + St. Croix in court.

"The City may want §67.24(b)(1)(iii) struck down simply because Grossman appears to be the first San Franciscan to have successfully sued for its enforcement in Superior Court."

Specifically, §67.24(b)(1)(iii) is "no more an attack on the attorney-client relationship than the Brown Act's mandate public meetings be conducted in the open," Ng declared. Indeed, the Brown Act mandates that most attorney-client communications with a local legislative body take place in open session, Ng observes. The Brown Act acknowledges

the relationship between a local body and its attorney does not require secrecy when it is outside the context of pending litigation.

Dennis Herrera's Public Spanking

Ng acknowledged that St. Croix and the City Attorney had, in effect, asked the Superior Court "to create new law by carving out an exception to the express terms of the Sunshine Ordinance." San Francisco voters had decided such City Attorney advice must be provided in the open.

Ng notes that the City Attorney's blanket repeated assertions of privilege without providing any substantive rationale, may be evidence of the City's strategy of stonewalling and evasive responses. Individuals seeking public records under CPRA or the Sunshine Ordinance should not have to burden the Court to obtain compliance with either law.

At issue here is that the drafting of procedural regulations — such as the Ethics Commission regulations in Grossman's second lawsuit — is a legislative function. As such, it's a process that should be open to members of the public, including candid, honest, and complete legal advice in connection with the regulations, unimpeded by objections to disclosure.

When voters speak through the ballot box, any power to waive "privilege" dissolves, since City Charter §14.100 grants voters the power to enact initiatives, and the power to nullify measures involving legislative matters by referendum. Witness the November 5 election in which — by referendum — voters nullified the legislative decision of the San Francisco Board of Supervisors to grant the 8 Washington project a height exemption when voters rejected Prop C. And witness the voter's adoption of the Sunshine Ordinance as a valid exercise of their authority to enact an ordinance restricting the secrecy permitted at City Hall.

"At issue here is that the drafting of procedural regulations — such as the Ethics Commission regulations in Grossman's second lawsuit — is a legislative function. As such, it's a process that should be open to members of the public."

St. Croix's argument that the City Charter's designation of the City Attorney as his counsel somehow trumps the voters' specific adoption that certain records must be made public holds no water, Ng noted. Whatever relationship exists between a general provision of a City Charter and a detailed specific enactment by voters, the fact that the pertinent section at issue was authorized by express State law renders the debate of no significance.

Both St. Croix and Dennis Herrera had to have known that State law expressly permits adoption of stricter open records rules supersedes local law, since State law appears to supersede even City charters. The SOTF's Order of Determination against St. Croix and the Ethics Commission was a lawful, binding order, which the Superior Court had authority to enforce. So it did, handing St. Croix and Dennis Herrera an embarrassing public spanking.

Ordered to Comply, the City Appeals Instead

Judge Ernest Goldsmith's *Order Granting Petitioner's Writ of Mandate* in Grossman's favor, dated October 25, 2013 states that "the record shows that Respondents [St. Croix and the Ethics Commission] had ***not met their burden*** [proving] that the withheld documents are exempt under the [CPRA] and the San Francisco Sunshine Ordinance" [emphasis added]. ***Goldsmith reached the same conclusion that the Sunshine Task Force had reached on June 5*** almost five months earlier, nearly a year after Grossman had been forced to file his Sunshine complaint.

"Judge Goldsmith's *Order* in Grossman's favor states that 'the record shows that Respondents [St. Croix and the Ethics Commission] had not met their burden [proving] that the withheld documents are exempt under the [CPRA] and the San Francisco Sunshine Ordinance'."

Goldsmith noted that under the Sunshine Ordinance, public records regarding advice on CPRA and the Sunshine Ordinance are, in fact, subject to disclosure, citing §67.24(b)(1)(iii) as the basis. This had to have disappointed Mr. Shen and City Attorney Dennis Herrera. The judge noted Shen had conceded the 24 documents withheld from Grossman consist of requests from Ethics Commission staff for legal advice and the City Attorney's responses analyzing the legal issues.

Goldsmith ordered St. Croix to deliver the remaining 24 documents to Grossman. Goldsmith also denied Shen's request to strike §67.24(b)(1)(iii) from the City's Administrative Code.

Clearly desperate to stop Allen Grossman's victory due to potentially far-reaching implications should he prevail, the City filed a *Motion to Stay* the Superior Court's order in the Court of Appeals First Appellate District on Friday, November 22. The Appeals Court granted the *Stay* pending resolution of the writ proceedings on the same date, despite the fact that Superior Court Judge Goldsmith had ruled in the "trial court phase" that the City and St. Croix had ***not*** met their burden of proof that additional records St. Croix had withheld are exempt under the CPRA or under San Francisco's Sunshine Ordinance. It's somewhat surprising that the Appeals Court didn't give Grossman a chance to respond to the *Motion to Stay* before it granted Shen the stay.

"Clearly desperate to stop Allen Grossman's victory should he prevail, the City filed a *Motion to Stay* the Superior Court's order in the Court of Appeals First Appellate District on Friday, November 22."

The City's request for the stay of enforcement was unavailable at the deadline to submit this article to the *Westside Observer* for its December issue. So it's not yet known what new, creative legal theories the City and Mr. Shen may have introduced in their *Stay* to fight Grossman's Superior Court victory.

The Appeals Court may potentially dismiss the writ summarily, but it may also wait for a full briefing before deciding whether to dismiss the Superior Court's Writ. Hopefully, the Court will wait for a briefing. Grossman's court briefs responding to the *Motion to Stay* are due December 23, and the City's reply to Grossman's response is due on January 7, so it will take another two months before the Appeals Court rules on the City's appeal.

Meanwhile, St. Croix's Superior Court costs continue to balloon. A subsequent public records request has revealed that in Grossman's second Superior Court case, the City Attorney's Office has already racked up 213.5 hours of time at the Superior Court level, at a cost of $51,178 plus $145 in expenses, fighting Grossman over a mere 24 documents. Just through the Superior Court phase, that's $2,138 per withheld document — and growing, since it is not yet known how much Grossman's lawyer may request from the Court in attorney's fees, nor is it yet known how much the City will eventually rack up in costs fighting Grossman during the Appeals process.

Courts have noted the unique responsibility of government attorney's such as Dennis Herrera to not only serve the government entities he represents, but also the public interests of citizens he serves. Herrera appears to hold no obligation to the voters who elected him, or to his duty to provide transparency and openness in San Francisco's government. He appears to believe his sole responsibility is protecting City officials from exposure of wrongdoing.

To date, Grossman's two Superior Court lawsuits have cost the City nearly $100,000, and is mounting — all because of St. Croix's and Herrera's needless battles against access to public records. The wasted money — significant and unnecessary costs — is an obscene amount for City Attorney Herrera to spend in the name of government secrecy.

Dennis Herrera — who sought re-election on November 5 unopposed — just doesn't seem to get it that San Franciscans want more Sunshine and transparency from City Hall, not more secrecy from our City Attorney.

Monette-Shaw is an open-government accountability advocate, a patient advocate, and a member of California's First Amendment Coalition. Feedback: monette-shaw@westsideobserver.com.