

City Hall Watch

## Supervisors Tinker With Open Government

By Patrick Monette-Shaw



San Francisco's Sunshine Ordinance Task Force has referred several complaints against sitting members of the Board of Supervisors to the Ethics Commission alleging official misconduct. Ethics has not held one public hearing on any referrals involving sitting members of the Board of Supervisors.

Since taking office to represent District 8 on the Board of Supervisors in November 2010, Supervisor Scott Wiener has distinguished himself by repeatedly tinkering with various San Francisco's open government laws; in some quarters he's referred to as Scott "The Tinkerer" Wiener. Others refer to him as "Tinkerbelle."

He's at it again, tinkering with San Francisco's Sunshine Ordinance, our local open government law adopted to supplement the California Public Records Act (CPRA), and the Brown Act covering open meetings.

Surprisingly, Supervisor Jane Kim, also elected in 2010 to represent District 6, may also be tinkering with the City's boards, commissions, and advisory bodies mandated to provide public oversight.

On November 1, 2011 the Sunshine Task Force issued an Order of Determination, finding that Supervisor Eric **Mar**, Chair of the Land Use Committee, Board president David **Chiu**, and Land Use Committee members Supervisor Scott **Wiener** and Supervisor Malia **Cohen** had collectively violated several sections of the Sunshine Ordinance by failing to provide the public with copies of 14 pages of amendments to the Park Merced Development Agreement.

The amendments had been provided to the Board of Supervisors by Chiu in connection with an agenda item, who had allowed the introduction of last-minute, substantive changes to the agenda without adequate public notice. The four Supervisors were also cited for failing to publish a meaningful agenda indicating the substance of the item involving the 14 pages of Park Merced amendments to adequately inform the public about the nature of the proposed development deal's amendments.

The Sunshine Task Force referred all four Supervisors to the Ethics Commission and District Attorney, citing willful failure (to comply with the Sunshine Ordinance) and official misconduct.

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As an aside, although Mayor Ed Lee referred official misconduct charges against Sheriff Ross Mirkarimi, the Ethics Commission has taken no action on the official misconduct charges against the four supervisors who sought to withhold the 14-page amendments of the Park Merced deal. Similarly, after the Sunshine Task Force referred official misconduct charges against Library Commission president Jewelle Gomez to the Ethics Commission on July 11 for on-duty misconduct, the Ethics Commission concurred Gomez had erred and forwarded its first-ever official misconduct charges to Mayor Lee; now eight months later, Lee has taken no action against Gomez.

In 1980, a state appellate court ruled in then-Airport Commissioner Joseph Mazolla's appeal that levying official misconduct charges requires a direct relationship of alleged wrongdoing to an office held. As deplorable as Mirkarimi's **off-duty** behavior may have been, it had nothing to do with his duties as Sheriff — and had occurred **before** he was officially sworn in.

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### **Supervisor Jane Kim Tinkers With Boards and Commissions**

For her part, Supervisor Kim was found by the Sunshine Task Force on June 7, 2011 to have violated the Sunshine Ordinance by not responding to a request for records concerning the Shelter Monitoring Committee in a timely manner, for failing to justify withholding of documents, and for failing to keep documents withheld to a minimum. She was ordered to produce the requested records within five days.

Sometime earlier in 2011, Supervisor Kim secretly requested, without public notice or during an open-to-the-public meeting, that the Board of Supervisor's Budget and Legislative Analyst — the Harvey Rose Consultancy — perform a confidential cost-benefit analysis of the City's 86 boards, commissions, task forces, and other advisory councils, 34 of which are authorized by the City Charter; the remaining 52 are authorized by the City's Administrative Code. Rose's May 13, 2011 analysis estimates the annual costs for boards, commissions, etc. totaled \$6.495 million, of which \$1.2 million — nearly 20 % of all costs attributable to boards and commissions — funds just ten Commission Secretaries serving nine City departments, each of whom have unique job classification codes and who collect median salaries and benefits of \$126,880.

Despite having been asked by Kim for a cost-benefit analysis, Rose wasted not one drop of ink in his 39-page analysis of any benefits of boards and commissions.

Nowhere in Rose's confidential analysis for Supervisor Kim (obtained through a public records request), does he note that the purported — and likely inflated — estimate of \$6.495 million to operate the boards and commissions represents just one-tenth of one percent of the City's \$6.834 *billion* budget (which total budget Rose must surely be aware of) — a fractional amount most observers believe to be a small, necessary price to pay for oversight of City government!

In his analysis for Kim, Rose deliberately took a swipe at the Sunshine Task Force by alleging that its Executive Secretary III earned more (\$79,524) than the Police Commission's Executive Secretary I (\$65,796). In fact, SOTF's secretary earned only \$75,728 — and no overtime — but Rose reported the highest pay step, not that secretary's actual earnings. And Rose failed to report that minutes of the Police Commission show that its "secretary" during 2011 was then-Lieutenant III Timothy Falvey who earned \$165,112 in 2011, including \$16,700 in overtime. (The Police Commission's new "secretary" in 2012 is a Police Inspector I, John Monroe, who earned \$152,228 in 2011, including \$22,363 in overtime.)

The \$75,278 for SOTF's secretary pales in comparison to the \$165,112 Falvey earned as the Police Commission's secretary, which Rose failed to note.

If Jane Kim really wants to lower the costs of boards and commissions, she should start by taking sworn officers out of desk jobs (and back to actual police work), and use more appropriate civilian clerical employees.

It's unclear whether Ms. Kim will publicly admit to requesting this confidential analysis, whether she will ever hold a public hearing to release Rose's analysis, or what her motives are tinkering with board and commission oversight bodies.

### **Supervisor Scott "The Tinkerer" Wiener Tinkers With the Sunshine Ordinance**

As for Tinkerer Wiener's track record, he has sought to dilute historic preservation at the Planning Commission, and sponsored ballot Proposition "F" last November to weaken campaign finance disclosure by redefining upwards the threshold of consulting service total fees so fewer consultants would be subject to disclosure. Prop. "F" would also have allowed the City to change any campaign consultant ordinances without further voter approval.

Wiener also sponsored Proposition "E," that would have granted the mayor or Board of Supervisors expanded authority to amend or repeal — not just "clean up" — ballot measures put before voters by the mayor or members of the Board of Supervisors three years following passage. He had initially introduced Prop. "E" to permit amending or repealing *all* ballot measures, including signature initiatives placed on the ballot by citizens, but had to tone down Prop. "E" following widespread voter outrage.

Luckily, the Friends of Ethics — a committee formed by five former Ethics Commissioners and Larry Bush, proprietor of [www.CitiReport.com](http://www.CitiReport.com) who just received the Society of Professional Journalists *James Madison Freedom of Information Award* in the *Community Media* category — stepped in to stop Wiener's busybody and nannyish tinkering; their efforts lead to the defeat of both Prop.'s "E" and "F."

Facing the twin disgrace of having been referred to the Ethics Commission over Park Merced misconduct on November 1, and slapped at the ballot box by voters on November 8, Wiener went back to his tinkering rabbit hole, and on December 13 requested that Rose's Budget and Legislative Analyst team survey each City department's costs to comply with San Francisco's Sunshine Ordinance.

Wiener discarded the niceties of requesting a cost-benefit analysis of complying with Sunshine, simply asking Rose to provide a one-sided cost analysis, apparently presuming no benefits accrue from the Sunshine Ordinance. Rose dutifully complied, again asking respondents no questions about the benefits side of the equation, just as he did on the Kim flawed survey instrument.

Like Kim before him, Wiener also did not request this analysis during an open-to-the-public meeting, nor did he issue a public notice announcing his request. Indeed, neither the Clerk of the Board nor Sunshine Task Force members were aware until late January that Wiener had placed his request to Rose, and it's not known whether Wiener even told the other ten Supervisors what he is up to.

Wiener's request claims to be evaluating the "effectiveness and efficiency" of implementation of the Sunshine Ordinance. His request claims "once we know how much the City spends to comply with the Ordinance, we can work to ensure we are getting the best value for our investment." In truth, he's engaging in payback to the Task Force, alleging the Task Force itself is the root problem for being "inefficient."

### **Budget and Legislative Analyst Harvey Rose's Flawed Survey Instrument**

The five-page survey Rose's staff sent to each City department is both highly flawed, and clearly riddled with multiple biases.

First, the survey does not ask departments to quantify how many of their records requests are requested under the Sunshine Ordinance vs. what proportion were requested under the state's CPRA statute. Obviously, the costs to comply with CPRA should be subtracted from the costs of the Sunshine Ordinance, but that question wasn't even asked.

Second, the survey contains no data verification procedure to weed out incorrect data entries, in part because the survey provided no guidance to departments on how to complete each question. For instance, the Elections Department initially reported 28,014 hours spent responding to information requests, wrongly including hours for pollworker, precinct level, and other mandated duties. Following a records request I placed, Elections submitted a revised survey to Rose, adjusting the inflated total down to just 4,847 hours.

Similarly, MUNI initially reported 1,877 formal Sunshine requests, but when I placed a request for its records requests log book, the log suddenly showed just 322 formal records requests (that MUNI appears not to have reported as a revised number to Rose).

Other departments reported incorrect job classification codes of employees providing public records, and at least three departments submitted revised survey's to Rose following my fact checking.

Third, multiple biases are involved, including "negative respondent bias," involving those with an animus to Sunshine who may be overstating estimated costs.

Rose's survey relies on "retrospective recall bias," in which employees were asked to report from foggy memories estimated vs. actual hours spent responding to records requests. (Of the 41 City department responses received to date, just 4 of 264 staff members who reported having spent time responding to formal Sunshine requests indicated they were reporting actual hours; 120 reported estimated hours; and 140 failed to report whether their time was estimated or actual.) Of the claimed 48,787 hours initially reported for this question (before the data were challenged and revised downward), just 658 hours (1.3%) were reported as "actual," 12,018 hours (24.6%) were "estimated," and the balance — 36,110 hours (74%) — failed reporting whether estimated or actual.

It's well known that retrospective recall is affected by a number of factors, including how far back in time respondents are asked to recall vague memories, ambiguity of questions asked, importance or aversion to the topic being asked, and motivations of those being questioned. Those harboring animosity to open government may have deliberately inflated their estimates.

Rose must surely know caution needs to be exercised with retrospective recall estimates, since errors due to confounding and bias are more common in retrospective studies than in prospective studies.

Fourth, Tinkerer Wiener did not request Rose evaluate benefits to taxpayers and the public of Sunshine, since the analysis focuses simply on “costs,” not a full cost-benefit analysis. For instance, we now know Dr. Kerr’s and Dr. Rivero’s dogged Sunshine requests led directly to restitution of \$350,000 wrongly misappropriated from Laguna Honda Hospital’s patient gift fund, just one of many clear benefits of Sunshine.

My persistence researching and publishing articles about “change orders” regarding Laguna Honda Hospital’s \$183 million in rebuild cost overruns may have contributed to the City finally suing Laguna Honda’s architects in Superior Court hoping to recover \$70 million of the now-admitted \$87 million in change orders.

Surely there are other examples of Sunshine “benefits” related to Sunshine records requests, which Wiener ignores and Rose isn’t examining — just as Rose failed to examine for Ms. Kim any benefits the City’s 86 boards and commissions bring to public oversight.

Fifth, Rose’s flawed survey asks for neither the types of records requested — many of which are codified for disclosure by other laws — nor the types of requestors.

For example, the Department of Emergency Management dutifully reported it had received 1,221 formal records requests, and admirably provided its records request log to George Wooding, which reveals that just 59 requests — a scant 4.8% — were for information that were *not* related to the City’s 9-1-1 call center for computer-aided dispatcher records. Of those 59 requests, fully 25% were placed by insurance companies, lawyers, or the media. Of the remaining 1,168 CAD-related 9-1-1 requests, 34% were placed by insurance companies, lawyers, and the media.

Over at the Mayor’s Office, of 102 public records requests, just 44% requested the mayor’s appointment calendar, his correspondence, or miscellaneous records. The remaining 56% of information requests to our mayor concerned development issues, public policies, Occupy SF, appointments to boards and commissions, the City budget, and assorted issues. And of those 102 requests to the mayor, 40.2% were placed by members of the media, 44.1% placed by private citizens, and the remaining 15.7% were placed by lawyers, organizations, political candidates, intergovernmental organizations, and other requestors.

Rose isn’t likely to report on either the types of records requested or the categories of records requestors, and Wiener may not understand — despite being a Harvard University-trained lawyer and former deputy city attorney who must have heard of the First Amendment, if only while in law school — that the media and lawyers are expert at using state and federal laws to pry loose public records, with or without our local Sunshine Ordinance, even if Wiener’s agenda may be to weaken San Francisco’s own open records laws.

Rose isn’t likely to report, either, about the increased costs of Sunshine compliance caused by a handful of recalcitrant City departments who fight open disclosure every step of the way, often on advice they claim was provided by City Attorney Dennis Herrera’s office. Herrera claims well over \$1 million was spent advising City departments about Sunshine. Rose may not factor in to the costs of Sunshine compliance, the cost of deliberate non-compliance fueled by the City Attorney’s bad advice to City departments stalling disclosure.

While it may be an admirable goal to determine costs of Sunshine, Rose can’t do that with the deeply flawed survey data he’s collecting.

The value of open government far outweighs the cost. If Rose also wrongly estimates Sunshine costs are \$6.5 million — as he did estimating costs of boards and commissions for Supervisor Kim — that will again represent less than one-tenth of one percent of the City’s \$6.834 *billion* budget — a paltry sum to provide right-to-know information to the public about what our government is up to.

Instead of swatting at potentially two-tenths of one percent of the City budget spent on boards, commissions, and compliance with Sunshine, Supervisors Kim and Wiener might more appropriately focus on the City’s escalating overtime budget approaching \$300 million, fixing potholes, or finding a way to reduce the City’s now \$1.49 *billion* spent in “total pay” — excluding benefits — for the City’s 11,756 highest-paid employees now earning over \$90,000 annually.

After all, picking on Sunshine is called “bullying,” by any other name. Bullies Wiener and Kim must surely know this, even as they tinker attempting to change open government using Rose’s flawed analyses as fodder.

*Monette-Shaw is an open-government accountability advocate, a patient advocate, and a member of California’s First Amendment Coalition. She 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>.*