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August 21, 2014

San Francisco Ethics Commission

Ben Hur, Esq., Ethics Commission Chairperson

Paul, Renne, Esq., Ethics Commission Vice-Chairperson

Beverly Hayon, Ethics Commissioner

Peter Keane, Esq., Ethics Commissioner

Brett Andrews, Ethics Commissioner

25 Van Ness Avenue, Suite 220

San Francisco, CA 94102

**Re: Appeal of Dismissal of SIA Complaint Against Sunshine
Task Force Member David Pilpel by Ethics Commission's
Executive Director John St. Croix**

Dear Chairperson Hur and Ethics Commissioners,

On Friday, August 15, I received in U.S. Mail a letter from Ethics Commission Executive Director John St. Croix dated August 13, 2014 informing me that following his preliminary review he had dismissed the SIA Complaint I filed against Sunshine Task Force Member David Pilpel on August 4, 2014. St. Croix made no mention of the first SIA Complaint I filed against Mr. Pilpel on June 22.

In the recent past, Ethics Commissioner Peter Keane raised the issue of whether the Ethics Commission has a process to reconsider cases dismissed by the Executive Director. I believe this case may have been wrongly dismissed.

Because of potential improprieties in Mr. St. Croix's August 13 letter, I am expressly asking the Ethics Commission to calendar a discussion to reconsider a complaint potentially inappropriately dismissed by Executive Director St. Croix.

You may recall that the August 4 complaint against Mr. Pilpel involved his attendance at the Ethics Commission's July 28 hearing in which Pilpel claimed to have been presenting public comment to the Ethics Commission as a private citizen.

But Mr. St. Croix did not address, or even mention, in his August 13 dismissal letter the SIA Complaint I filed against Sunshine Task Force Member David Pilpel on June 22, which complaint alleged that Mr. Pilpel had on April 28, 2014 testified to the Ethics Commission by introducing himself during public comment as a member of the Sunshine Ordinance Task Force, not as a private citizen.

The August 4 SIA Violation Complaint

In his letter dismissing the August 4 SIA complaint, Mr. St. Croix only cited Section III.A.1, "*Activities that Conflict with Official Duties*," of the applicable SIA, which states in relevant part:

"No officer or employee may engage in an outside activity (regardless of whether the activity is compensated) that conflicts with his or her City duties. An outside activity conflicts with City duties when the ability of the officer or employee to perform the duties of his or her City position is materially impaired. Outside activities that materially impair the ability of an officer or employee to perform his or her City duties include, but are not limited to, activities that disqualify the officer or employee from City assignments or responsibilities on a regular basis."

Mr. St. Croix noted that Pilpel had attended the July 28 hearing as a private citizen on his own time, there was no Task Force meeting held at the same time (which might have caused Pilpel to have been absent from his assignment on the Task Force), Pilpel had not used City resources, and his appearance had not materially impaired his ability to perform his Task Force duties.

But Mr. St. Croix makes no mention in his letter of dismissal, Section III.B.1, "*Restrictions That Apply to Officers or Employees in Specified Positions*," that certain activities are also expressly prohibited for individual officers and employees holding specific positions, and that notwithstanding Section III.A.1, there are other activities that are expressly prohibited for officers holding specific positions. Section III.B.1 states:

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*“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]

To the extent that Pilpel testified to the Ethics Commission on July 28 regarding Sunshine Complaint #13-024, *Mica Ringel vs. Planning Department* — whether as a member of SOTF or as a member of the public — Mr. Pilpel 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 and that was clearly a matter that falls **inside** the scope of his duties as a member of the Task Force. As such, it appears that Mr. Pilpel violated Section III.B.1 of the applicable SIA, which Mr. St. Croix did not address in his letter dismissing the August 4 SIA complaint.

Although he claimed to be speaking as a member of the public, Pilpel switched twice from speaking in the first person, and used the third person form of address instead, as if he was speaking on behalf of multiple members of the Task Force.

Section XII, C.2(b) of the *Ethics Commission's Regulations for Investigations and Enforcement Proceedings* of matters brought before the Commission states that when considering violations of Ethics laws, the Commission shall consider circumstances surrounding a complaint, including the “presence or absence of any intention to conceal, deceive, or mislead.” When Pilpel testified on July 28 to the Ethic Commission, he appears to have either concealed information contained in the Task Force's record of proceedings in the *Ringel vs. Planning Department* Sunshine complaint, or possibly misled the Commission:

- Notably, Mr. Pilpel failed to inform the Ethics Commission on July 28 that during the Task Force's January 13, 2014 Education, Outreach and Training Committee meeting regarding the status of the Planning Department's compliance with the Sunshine Task Force's Order of Determination, that he had voted in support of a motion to refer the case back to the full Task Force's jurisdiction, which motion passed 3 to 0 with his affirmative vote.
- Also, Mr. Pilpel failed to inform the Ethics Commission on July 28, that on February 5, 2014 a second 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. That motion passed on a vote of 7 to 1, with the sole “Noe” vote cast by Member Pilpel. 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 concerning the *Ringel vs. Planning Department* Sunshine complaint.

Ex Parte Communications

As both SIA complaints against Mr. Pilpel illustrate, he may also be engaging in *ex parte* communications with the Ethics Commission, defined here as a communication in a quasi-judicial proceeding raised by one person in the absence of, and without representation or notification to, other interested parties, and/or improper unilateral contacts with an arbitrator (in this Case the Ethics Commission itself), or a represented party without notice to the other party or counsel for that party.

When Mr. Pilpel appears in front of the Ethics Commission, he has provided no notification to either his co-members on the Sunshine Task Force that he will be attending Ethics Commission hearings on concluded matters that the Task Force has taken a vote on and made a referral to Ethics, nor has he provided notification to the Sunshine complainants that he intends to present additional testimony regarding complaints found by the Task Force to have had merit in favor of a complainant.

- Indeed, Section XIII.A, “Ex Parte Communications” of the *Ethics Commission's Regulations for Investigations and Enforcement Proceedings* stipulates:

“Once a complaint is filed, no Commissioner or staff member shall engage in oral or written communications outside of a Commission meeting, interview or settlement conference regarding the merits of an enforcement action with the respondent or complainant or any person communicating on behalf of the respondent or complainant unless the communication is necessary for the conduct of the investigation or enforcement action.”

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The same underlying and overarching theory that applies to Ethics Commissioners and Ethics staff should also apply to members of the Sunshine Task Force: Once a Sunshine complaint is filed with the Sunshine Ordinance Task Force, no member of the Task Force should be engaging in oral or written communications outside of Task Force meetings regarding either the merits of a Sunshine complaint, or the merits of an Task Force Order of Determination and referral to the Ethics Commission for enforcement proceedings. Pilpel's *ex parte* communications with the Ethics Commission are not necessary to the conduct of an Ethics investigation or an Ethics enforcement action.

- In addition, the Sunshine and Ethics training provided by the City Attorney's office in the "*Sunshine & Ethics Training Video*" from 2014 that Mr. Pilpel is required to have taken 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, and commissioners must act like judges, including following procedural rules such as bans on *ex parte* communications. The City Attorney's training video contains only a brief mention of the SOTF at the end of the two-hour training video, but it notes the Task Force has broad jurisdiction to hear complaints.

City Attorney Dennis Herrera's opening remarks on the video indicate that public officials are supposed to be unbiased decision-makers. Pilpel's *ex parte* communications to the Ethics Commission does not illustrate to Sunshine complainants that he, Pilpel, is unbiased, and his *ex parte* communications before the Ethics Commission do not illustrate that he will be a fair "judge" hearing current or future Sunshine Complaints.

If anything, when Pilpel testifies to the Ethics Commission either as a "member of the Task Force," or under the bald pretext of speaking as a "private citizen," he is commenting on the merits of an enforcement action and merits of decisions reached by the full Sunshine Task Force that fall **inside** the scope of his duties as a member of the Task Force, illustrating that he is both biased and being unfair to Sunshine complainants *after* the Task Force has already concluded adjudicative hearings.

The June 22 SIA Violation Complaint

As noted in the initial June 22 SIA violation complaint, when Pilpel testified to the Ethics Commission on April 28, 2014 he directly interfered with the Task Force's referral of Sunshine complaint #12-058, *Dominic Maionchi vs. Recreation and Parks Department* to Ethics by introducing himself as a member of the Task Force during public comment — in effect speaking as an "agent" of the Task Force — during the hearing without authorization from the Task Force to do so and no approved "Advance Written Determination" (waiver).

That deprived Maionchi of due process notice that Pilpel intended to undercut and advocate to overturn a prior decision the full Task Force had ruled was appropriate. As such, Pilpel ignored the City Attorney's "*Sunshine & Ethics Training Video*" training that adjudicative bodies such as the Task Force must protect the parties' due process rights.

Pilpel's testimony on April 28 helped convince the Ethics Commission to reject the *Maionchi vs. Recreation and Parks Department* complaint and return it to the Task Force for having named the so-called "wrong actor" in SOTF's referral for enforcement to Ethics.

Again, Pilpel appears to have either concealed information from the Ethics Commission contained in the Task Force's record of proceedings in the *Dominic Maionchi vs. Recreation and Parks Department* Sunshine complaint, or possibly mislead the Commission, in contravention of Section XII, C.2(b) of the *Ethics Commission's Regulations for Investigations and Enforcement Proceedings* regarding the "presence or absence of any intention to conceal, deceive, or mislead." For instance:

- Pilpel creatively neglected to note during the Ethics Commission's hearing on April 28, 2014, that on November 6, 2013, Mr. Pilpel had, himself, also voted in favor of forwarding complaint #12-058, *Maionchi vs. Recreation and Parks Department* to the Ethics Commission on the Task Force's 8-0 vote to do so, by including finding a violation of §67.34, the willful violation provision, which Pilpel voted had occurred. Ostensibly, on April 28, 2014, Pilpel sought a "do-over" of his November 6, 2013 vote finding willful violation by Ginsburg referring the matter to Ethics.
- Pilpel creatively neglected to note during the Ethics Commission's hearing on April 28, 2014, that on September 4, 2013, he seconded a motion to provide direct notice to Ginsburg that Ginsburg was being asked to attend the Task Force's hearing, along with Sarah Ballard, on October 2.

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- Pilpel again creatively neglected to note during the Ethics Commission's hearing on April 28, 2014, that on November 6, 2013, Mr. Pilpel had, himself, also voted in favor of forwarding complaint #12-508 against Ginsburg to the Ethics Commission on the Task Force's 8-0 vote to do so, specifically naming Ginsburg as being responsible.

For the foregoing reasons, I am expressly asking the Ethics Commission to calendar a discussion to reconsider the August 4 SIA complaint against Mr. Pilpel that was potentially inappropriately dismissed by Executive Director St. Croix.

[signed]

Patrick Monette-Shaw

Columnist/Reporter

Westside Observer Newspaper