



DENNIS J. HERRERA
City Attorney

CELIA W. LEE
Deputy City Attorney

DIRECT DIAL: (415) 554-3858
E-MAIL: celia.lee@sfgov.org

**MEMORANDUM
PRIVILEGED & CONFIDENTIAL**

TO: Sunshine Ordinance Task Force
FROM: Celia W. Lee
Deputy City Attorney
DATE: September 26, 2013
RE: Complaint No. 13021 – Monette-Shaw/Rivero v. Public Health Commission, et al.

COMPLAINT

Patrick Monette-Shaw and Maria Rivero, M.D. (“Complainants”) make a complaint regarding improper agenda notice for the April 2, 2013 Health Commission meeting. They contend that the Public Health Commission (“Commission”), Sonia Melara (President, Health Commission), Barbara Garcia (Director, Department of Public Health), and Mivic Hirose (CEO, Laguna Honda Hospital) violated the Ordinance by: (1) failing to include a meaningful description for an agenda item, (2) failing to refer to an explanatory document, and (3) failing to make available to the public, via either attachment or reference, a particular document relating to an agenda item for the Public Health Commission’s April 2, 2013 meeting.

COMPLAINANT FILES COMPLAINT:

On April 16, 2013, Complainants filed a Complaint against the Commission, alleging violation of Sunshine Ordinance sections 67.7 and 67.9. An amended complaint (the operative complaint before the Task Force) dated April 18, 2013, was submitted to the Task Force on April 19, 2013.

JURISDICTION

The Commission is a department under the Ordinance. The Task Force therefore generally has jurisdiction to hear a complaint of a violation of the Ordinance against the Commission. The Commission has not contested jurisdiction.

Complainants also identify individual respondents: Sonia Melara, Barbara Garcia, and Mivic Hirose. Complainants contend that by virtue of Melara and Garcia’s positions and the Commission bylaws, they are responsible for setting the agendas for Commission meetings. Complainants contend that Hirose, as Executive Administrator/CEO of Laguna Honda Hospital, should have known from her annual Sunshine Ordinance training that the agenda was improper. Complainants further contend that each Health Commissioner should have known that their meeting agenda was defective due to their annual Sunshine Ordinance training, yet none objected. Melara, Garcia, and Hirose and each Commissioner are all employees/officials of the City. None of the individual respondents have contested jurisdiction.

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APPLICABLE STATUTORY SECTION(S)**Section 67 of the San Francisco Administrative Code (Sunshine Ordinance):**

- Section 67.7 governs descriptions of agenda items for a public meeting.
- Section 67.9 governs the availability and disclosure of agendas and related materials as public records.

Section 54950, et seq. of the Cal. Gov't Code (Brown Act)

- Section 54954.2 governs requirements for agendas for public meetings.

APPLICABLE CASE LAW:

- *Phillips v. Seely* (1974) 43 Cal.App.3d 104, 120 ("where the subject matter to be considered is sufficiently defined to apprise the public of the matter to be considered and notice has been given in the manner required by law, the governing body is not required to give further special notice.").
- *Carlson v. Paradise Unified Sch. Dist.* (1971) [18 Cal.App.3d 196](#), 200 ("it is imperative that the agenda of the board's business be made public and in some detail so that the general public can ascertain the nature of such business.").
- The California Attorney General has concluded that, under Government Code §54954.2, the agenda must include a sufficient description "to inform interested members of the public about the subject matter under consideration so that they can determine whether to monitor or participate in the meeting of the body." See *The Brown Act: Open meetings for Local Legislative Bodies*.

BACKGROUND:**Complaint:**

Complainants submitted their operative complaint via email on April 19, 2013. The gist of the complaint is that the agenda for the Health Commission meeting of April 2, 2013 did not provide a description of the agenda item denoted "LHH Update" (meaning Laguna Honda Hospital Update) that fulfilled the requirements of the Sunshine Ordinance or the Brown Act for agenda item descriptions for public meetings, and did not appropriately refer to an explanatory document for that agenda item, as also required by the Sunshine Ordinance. The complaint contains four parts and a separate section entitled "Additional Description" that contains further elaboration regarding Complainants' grievance.

The actual agenda for the April 2 meeting was distributed to Complainants via two methods: (1) via email as an PDF document attachment (which Complainants received via DPH's interested persons email list), which is included as Enclosure 1 to the complaint, and (2) online posting on the Health Commission's website via hyperlink on a webpage listing meeting materials for the 4/2/13 Health Commission meeting (Enclosure 2 to the complaint).

On the agenda document itself, agenda item #7 listed "LHH Update" with no descriptive wording, other than it was to be given by Mivic Hirose, LHH Chief Executive Administrator. No further subject matter was included in that agenda item description, and it did not refer to further documentation.

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There existed a separate one-page memorandum document, dated March 29, 2013 with the subject matter of “Laguna Honda Updates” (referred to in this instant memo as “3/29/13 LHH Update Memo” for the sake of clarity), which described in detail the nature of the updates regarding Laguna Honda Hospital and correlated to the agenda item #7 of “LHH Update.” That Memo, among other things, contained details regarding the terms of a settlement between the City by Dr. Derek Kerr, including the installation of a plaque in the hospital and its wording recognizing Dr. Kerr for his accomplishments, and the provision of a letter to Dr. Kerr from LHH’s Medical Director, Dr. Colleen Riley, and Chief of Staff, Dr. Steven Thompson, regarding the respect of Dr. Kerr’s colleagues at LHH for him and the reason for the expiration of his clinical privileges upon his retirement from City service in 2010. This 3/29/13 LHH Update Memo was not separately provided via email to individuals who received the agenda via email from DPH.

As demonstrative material, Complainants included with their complaint Enclosure 2, which consists of an annotated screenshot of the webpage that listed the meeting materials for the 4/2/13 full Health Commission meeting. Under the heading of “The 4/2/13 Full Health Commission meeting materials,” that page listed the agenda items in the same order that they appear on the actual agenda document. That page also included hyperlinks to documents where applicable and where they were listed on the agenda (including the agenda document and the 3/29/13 LHH Update Memo), although the page did not specifically state that the hyperlinks existed and, according to Complainants, it was not an “apparent hyperlink” (i.e., it did not include a full file or path indicator). For example, if one clicked on “Agenda” on the DPH webpage, the user would open a link to the agenda document. Similarly, if one clicked on the listing for “LHH Update,” it would bring the user to the 3/29/13 LHH Update Memo. Complainants state that Complainant Dr. Rivero only discovered the hidden hyperlink to the 3/29/13 LHH Update Memo when she inadvertently clicked on the “LHH Update.”

Allegations:

1. Complainants allege that Respondents violated Section 67.7(a) of the Sunshine Ordinance, which requires that “a policy body shall post an agenda containing a meaningful description of each agenda item of business to be transacted or discussed at the meeting.” Complainants allege that “the agenda item for Dr. Kerr’s public apology contained no description at all, let alone a meaningful description; indeed the agenda listed on the title of the agenda item, and ***completely elided (omitted) any description whatsoever.***” (Emphasis in original complaint.) Moreover, Complainants criticize the Commission for lumping several separate items regarding Laguna Honda Hospital into a single agenda item without describing any of the separate agenda items embedded in the “LHH Update” agenda item.

2. Complainants also allege that as the “LHH Update” agenda item contained no description, it violated the “meaningful description” requirement of the Sunshine Ordinance. Section 67.7(b) states that a “a description is meaningful if it is sufficiently clear and specific to alert a person of average intelligence and education whose interested are affected by the item that he or she may have reason to attend the meeting or seek more information on the item. The description should be brief, concise and written in plain, easily understood English.”

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3. The third portion of the complaint concerns the 3/29/13 LHH Update Memo. Sunshine Ordinance Section 67.7(b) requires that the agenda item description “shall refer to any explanatory documents that have been provided to the policy body in connection with an agenda item, such as correspondence or reports, and such documents shall be posted adjacent to the agenda or, if such documents are of more than one page in length, made available for public inspection and copying at a location indicated on the agenda during normal office hours.” Complainants allege that as the agenda item of “LHH Update” did not refer to any explanatory document, but should have referred to the 3/29/13 LHH Update Memo; as such, Respondents did not comply with Section 67.7(b).

4. The final portion of the complaint alleges that Respondents violated Section 67.9(a) of the Sunshine Ordinance, which requires that “[a]gendas of meetings and any other documents on file with the clerk of a policy body, when intended for distribution to all, or a majority of all, of the members of a policy body in connection with a matter anticipated for discussion or consideration at a public meeting shall be made available to the public.” Complainants contend that the agenda that was emailed to DPH’s “interested persons” list did not attach or refer to the 3/29/13 LHH Update Memo.

Complainants included an “Additional Discussion” section of their complaint, consisting of the following points/complaints:

- Agenda item 7, “LHH Update,” did not use standard hypertext markup language formatting to provide a visible hyperlink;
- The agenda did not provide any instructions that agenda item titles may be working hyperlinks to background materials;
- Respondents do not comply with the City Attorney’s “Good Government Guide” which advises that “Sometimes it is best for an agenda description of an item to highlight specific components of an issue that are expected to be the main focus of discussion and action;” (*Good Government Guide*, Part 3.IV.D.1, page 116)
- The Health Commission agenda at issue also violated the Brown Act, which also requires a brief general description of each item to be discussed at the meeting. California Government Code Section 54954.2(a).
- The one-page 3/29/13 LHH Update Memo violated the Sunshine Ordinance, and “possibly Dr. Kerr’s settlement agreement against the City” by lumping together routine updates regarding operational activities with the issue of Dr. Kerr’s settlement agreement. Complainants contend that the matter regarding Dr. Kerr should have been listed as a separate agenda item.
- Complainants contend that there has been a pattern of repeated agenda item description violations by the Health Commission.

Response: there was no response by the Public Health Commission within the time frame allowed by the Task Force (five days).

On September 20, 2013, Sonia Melara, Health Commission President, provided a response to Complaint 13021. She contended that regarding the level of detail to the agenda item, that type of agenda title, with the name of the facility and update, has been the usual and customary method of identifying agenda times for the SF Health Commission meetings for many years. She conceded that in the future, updates that reference a settlement in this fashion could be

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described with more specificity, and if the Task Force finds that discussions of actions taken to fulfill a settlement agreement warrant a separate item on the agenda or greater detail, the Commission would be willing to modify future agendas accordingly.

Ms. Melara's response also noted that upon receipt of the complaint that the Health Commission did not use standard hypertext markup language to provide a visible hyperlink, the Health Commission directed its Executive Secretary to provide clearer instructions to the public regarding access to meeting materials posted online. The next meeting page was revised to include a statement specifically informing readers that "to access information for the Health Commission meetings listed below, you may click on the bolded items in blue font to view documents associated with a specific meeting agenda item." Ms. Melara noted that on the Friday before every Health Commission meeting, the Executive Secretary sends an email to interested parties which includes the agenda of the upcoming meeting and the draft unapproved minutes of the previous meeting. The email also includes a link to the DPH website "Next Meeting" page that lists all the Commission meeting items and provides links to available meeting documents.

QUESTIONS THAT MIGHT ASSIST IN DETERMINING FACTS:

- Did the agenda item #7 denoted "LHH Update" describe the actual matters discussed at the meeting?
- In the past, have any and all matters pertaining to Laguna Honda Hospital discussed at Health Commission meetings been described in the agenda as "LHH Update?"
- Was the 3/29/13 LHH Update Memo actually made available to the public?

LEGAL ISSUES/LEGAL DETERMINATIONS:

- Was the agenda item #7 denoted "LHH Update" a "meaningful description of each item of business" pursuant to Sections 67.7(a) and (b) of the Sunshine Ordinance?
- Was the 3/29/13 LHH Update Memo an explanatory document that should have been referred to in the agenda item description, pursuant to Section 67.7(b) of the Sunshine Ordinance?
- Was the 3/29/13 LHH Update Memo posted "adjacent to the agenda" pursuant to Section 67.7(b) of the Sunshine Ordinance?
- Was the 3/29/13 LHH Update Memo "made available to the public" in compliance with Section 67.9(a) of the Sunshine Ordinance?

CONCLUSION

THE TASK FORCE FINDS THE FOLLOWING FACTS TO BE TRUE:

THE TASK FORCE FINDS THE ALLEGED VIOLATIONS TO BE **TRUE OR NOT TRUE.**

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ATTACHED STATUTORY SECTIONS FROM CHAPTER 67 OF THE SAN FRANCISCO ADMINISTRATIVE CODE UNLESS OTHERWISE SPECIFIED (in pertinent part)

SEC. 67.7 AGENDA REQUIREMENTS; REGULAR MEETINGS.

(a) At least 72 hours before a regular meeting, a policy body shall post an agenda containing a meaningful description of each item of business to be transacted or discussed at the meeting. Agendas shall specify for each item of business the proposed action or a statement the item is for discussion only. In addition, a policy body shall post a current agenda on its Internet site at least 72 hours before a regular meeting.

(b) A description is meaningful if it is sufficiently clear and specific to alert a person of average intelligence and education whose interests are affected by the item that he or she may have reason to attend the meeting or seek more information on the item. The description should be brief, concise and written in plain, easily understood English. It shall refer to any explanatory documents that have been provided to the policy body in connection with an agenda item, such as correspondence or reports, and such documents shall be posted adjacent to the agenda or, if such documents are of more than one page in length, made available for public inspection and copying at a location indicated on the agenda during normal office hours.

(c) The agenda shall specify the time and location of the regular meeting and shall be posted in a location that is freely accessible to members of the public.

(d) No action or discussion shall be undertaken on any item not appearing on the posted agenda, except that members of a policy body may respond to statements made or questions posed by persons exercising their public testimony rights, to the extent of asking a question for clarification, providing a reference to staff or other resources for factual information, or requesting staff to report back to the body at a subsequent meeting concerning the matter raised by such testimony.

(e) Notwithstanding Subdivision (d), the policy body may take action on items of business not appearing on the posted agenda under any of the following conditions:

(1) Upon a determination by a majority vote of the body that an accident, natural disaster or work force disruption poses a threat to public health and safety.

(2) Upon a good faith, reasonable determination by a two-thirds vote of the body, or, if less than two-thirds of the members are present, a unanimous vote of those members present, that (A) the need to take immediate action on the item is so imperative as to threaten serious injury to the public interest if action were deferred to a subsequent special or regular meeting, or relates to a purely commendatory action, and (B) that the need for such action came to the attention of the body subsequent to the agenda being posted as specified in subdivision (a).

(3) The item was on an agenda posted pursuant to subdivision (a) for a prior meeting of the body occurring not more than five calendar days prior to the date action is taken

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on the item, and at the prior meeting the item was continued to the meeting at which action is being taken.

(f) Each board and commission enumerated in the Charter shall ensure that agendas for regular and special meetings are made available to speech and hearing impaired persons through telecommunications devices for the deaf, telecommunications relay services or equivalent systems, and, upon request, to sight impaired persons through Braille or enlarged type.

(g) Each policy body shall ensure that notices and agendas for regular and special meetings shall include the following notice:

KNOW YOUR RIGHTS UNDER
 THE SUNSHINE ORDINANCE
 (Chapter 67 of the
 San Francisco Administrative Code)

Government's duty is to serve the public, reaching its decisions in full view of the public.

Commissions, boards, councils and other agencies of the City and County exist to conduct the people's business. This ordinance assures that deliberations are conducted before the people and that City operations are open to the people's review.

FOR MORE INFORMATION
 ON YOUR RIGHTS UNDER THE SUNSHINE
 ORDINANCE OR TO REPORT A VIOLATION
 OF THE ORDINANCE, CONTACT THE
 SUNSHINE ORDINANCE TASK FORCE.

(h) Each agenda of a policy body covered by this Sunshine Ordinance shall include the address, area code and phone number, fax number, e-mail address, and a contact person's name for the Sunshine Ordinance Task Force. Information on how to obtain a free copy of the Sunshine Ordinance shall be included on each agenda.

SEC. 67.9 AGENDAS AND RELATED MATERIALS: PUBLIC RECORDS

(a) Agendas of meetings and any other documents on file with the clerk of the policy body, when intended for distribution to all, or a majority of all, of the members of a policy body in connection with a matter anticipated for discussion or consideration at a public meeting shall be made available to the public. To the extent possible, such documents shall also be made available through the policy body's Internet site. However, this disclosure need not include any material exempt from public disclosure under this ordinance.

(b) Records which are subject to disclosure under subdivision (a) and which are intended for distribution to a policy body prior to commencement of a public meeting shall be made available for public inspection and copying upon request prior to commencement of such meeting, whether or not actually distributed to or received by the body at the time of the request.

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(c) Records which are subject to disclosure under subdivision (a) and which are distributed during a public meeting but prior to commencement of their discussion shall be made available for public inspection prior to commencement of, and during, their discussion.

(d) Records which are subject to disclosure under subdivision (a) and which are distributed during their discussion at a public meeting shall be made available for public inspection immediately or as soon thereafter as is practicable.

(e) A policy body may charge a duplication fee of one cent per page for a copy of a public record prepared for consideration at a public meeting, unless a special fee has been established pursuant to the procedure set forth in Section 67.28(d). Neither this section nor the California Public Records Act (Government Code sections 6250 et seq.) shall be construed to limit or delay the public's right to inspect any record required to be disclosed by that act, whether or not distributed to a policy body.

CALIFORNIA GOVERNMENT CODE SEC. 54954.2 (THE BROWN ACT)

(a) At least 72 hours before a regular meeting, the legislative body of the local agency, or its designee, shall post an agenda containing a brief general description of each item of business to be transacted or discussed at the meeting, including items to be discussed in closed session. A brief general description of an item generally need not exceed 20 words. The agenda shall specify the time and location of the regular meeting and shall be posted in a location that is freely accessible to members of the public...