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City Attorney's Attack on Public Records Law

Sandbagging, Legal Fairy Dust, and Double-Speak

Open Records: Has City Attorney Dennis Herrera forgotten his own claim that public officials should conduct government functions in honest and open ways, responsive to citizens? Or his claim that "a public office is a public trust"?

by Patrick Monette-Shaw

West Side residents are increasingly concerned about the City Attorney Office's disregard for San Francisco's public records Sunshine Ordinance, as are all San Franciscans. City Hall's machinations affect the West Side as disastrously as affecting the rest of the City.

Consider the City Attorney's conclusion in the recent settlement of lobbying violations by former Board of Supervisor Michael Yaki. While City Attorney Dennis Herrera wanted to send "a strong message that the San Francisco Lobbyist Ordinance has teeth," the machinations of Herrera and his team to remove the teeth in San Francisco's Sunshine Ordinance is extremely troubling. It's total double-speak.

San Franciscans should be alarmed that the City Attorney's Office has appealed the Superior Court ruling in *Allen Grossman v. John St. Croix, Executive Director, San Francisco Ethics Commission; and the Ethics Commission* to the Appellate Court. The City's appeal aggressively seeks to strike down one or more key sections of our local open government Sunshine Ordinance. Apparently with City Attorney Herrera's blessing.

What follows is a discussion of the 222 pages of legal briefs filed to date in Grossman's case, and another 50 pages of open records regulations in our local Sunshine Ordinance and California's Public Records Act. Two final briefs — one from each party to the case — had been scheduled to be filed in Appellate Court on February 21 and March 10. But on February 19, the City requested yet another three-week delay. The two final briefs are now due on March 7 and March 31. We'll be watching.

A number of recent issues facing West Side residents were exposed from public records requests placed by members of the public. *Westside Observer* readers may recall our coverage of the difficulties that George Wooding faced when he sought obtaining public records from the Recreation and Parks Department. Wooding is president of the Midtown Terrace Homeowners Association. Wooding's subsequent Sunshine complaint was inappropriately dismissed by the Ethics Commission.

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Readers may also recall the scandal of the raid of Laguna Honda Hospital's (LHH) patient gift fund. Multiple public records requests uncovered that $350,000 in the patient's gift fund had been inappropriately diverted to fund staff perks. The hospital was eventually forced to reimburse the misappropriated funds.

Or consider the long-running dispute homeowners living on Dellbrook Avenue behind LHH faced regarding the ear-splitting external fire alarms on the roof of LHH's new buildings pointed directly at their homes. Their fight against the City involved several Sunshine records requests. *Observer* readers may also recall our coverage of West Side resident Rita O'Flynn's long-running legal dispute involving the City's deeply flawed lead-based paint remediation program. O'Flynn exposed the program's flaws following multiple public records requests.

Long before the feel-good Bat Kid flew in to San Francisco to save Gotham-by-the-Bay from its own devices, forces of darkness from our own City Attorney's Office had long sprinkled the City with legal fairy dust. Unfortunately, the chocolate Key-to-the-City that Mayor Ed Lee presented to the Bat Kid couldn't unlock the City's doors of secrecy. Doors slammed shut by Herrera and his staff. Then bolted for good measure.

Herrera has served for 11 years as City Attorney. He just won unopposed reelection. We're stuck with him for another four-year term, just as we had been stuck with his predecessor, Louise Renne, for 16 years when she served as City Attorney between 1986 and January 8, 2002. Just two City Attorney's over a 31-year period?

In the introduction to a so-called "**Good Government Guide**" written by Herrera for City department heads and senior managers, Herrera somewhat ironically quoted Franklin Knight Lane, San Francisco's City Attorney a century ago, from 1899 to 1900. Lane wrote, "No man should have a political office because he wants a job. A public office is not a job. It is an opportunity to do something for the public. And once in office, it remains for him to prove that the opportunity was not wasted."

"Herrera suddenly wants a key provision of the Sunshine Ordinance struck down. Is this a sign Herrera is proving his opportunity to serve the public has been entirely wasted?"

Herrera ended his Good Government Guide introduction reminding employees "a public office is a public trust." He noted employees have a responsibility to conduct government functions in ways that are honest, open, and responsive to the citizens. But a cloud of legal fairy dust hangs over Herrera's leadership. His pattern of government secrecy, coupled with clear disregard of public records law, is troubling.

The City's appeal to overturn Grossman's Superior Court Sunshine victory represents an assault on our Sunshine Ordinance. Herrera suddenly wants a key provision of it struck down. Is this a sign Herrera is proving his opportunity to serve the public has been entirely wasted?

Desperate to Stop Grossman's Victory

As the *Westside Observer* reported in "**Four Major Sunshine Victories**" in our December–January issue, long-time open government advocate Allen Grossman — a Harvard University Law School graduate — obtained his second Superior Court victory against the Ethics Commission and its Executive Director, John St. Croix. Superior Court Judge Ernest Goldsmith ruled in Grossman's favor on October 25. Goldsmith ruled St. Croix and the City failed to meet their burden proving that records improperly withheld from Grossman are exempt under either the Sunshine Ordinance or California's Public Records Act (CPRA).

That should have ended the dispute. St. Croix should have produced the 24 improperly withheld records. He didn't.

The *Observer* reported in December that Deputy City Attorney Andrew Shen's 20-page ***Respondents Opposition to Petition for Writ of Mandate***, filed on behalf of the City on October 9, 2013 was the worst legal filing this columnist ever had the displeasure of reading. The brief began by 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." Of course voters can. Shen's brief went quickly downhill from there.

"St. Croix, Shen, and Herrera are hell bent on keeping the City Attorney's advice concerning the draft regulations totally secret."

City's "Tip Toe Through the Tulips" Appeal

But that was before reading Shen's 42-page ***Petition for Peremptory Writ of Mandate and/or Prohibition*** filed in Appeals Court on November 22. It's even worse reading. The appeal — sprinkled with another heavy dose of fairy dust — attempts to overturn Grossman's Superior Court victory.

The subject matter of Grossman's records request — drafts of Ethics Commission procedural regulations that were being vetted as a legislative function, and the City Attorney's views on various draft provisions — epitomizes the type of legal advice that does ***not*** depend on confidentiality. Drafting of procedural regulations is akin to a legislative function. Shen knows this, or should. So does Dennis Herrera. So does the Appeals Court.

But St. Croix, Shen, and Herrera are hell bent on keeping the City Attorney's advice concerning the draft regulations totally secret. So much for Herrera's claim public office is a public trust. So much for his admonition the people's business should be conducted in an honest and open manner.

Shen beats the same drum, more loudly. He repeatedly claims the City's principal argument against Grossman is that the 1999 Sunshine "Ordinance is invalid because it conflicts with the [City] Charter." Shen asserts that it is "beyond dispute that an ordinance cannot trump the provisions of a city charter, any more than a state statute can trump the California Constitution." He asserts that if voters wish to withdraw the attorney-client, and attorney work product, privileges, voters "may only do so by amending the [City] Charter."

Grossman's lawyer, Michael Ng, asserts there is no such conflict. Shen appears to be wrong on the "trumping" issue.

For starters, the Sunshine Ordinance was adopted by the Board of Supervisors as an Ordinance in 1993, presumably "approved as to form" by then-City Attorney Louise Renne. Among other things, "approved as to form" means that an Ordinance has been reviewed by the City Attorney to ensure it is not "unconstitutional" with respect to municipal law, including the Charter.

"Had the proposed Sunshine changes been so violative of the City Charter, why would prominent San Franciscans — such as then-Supervisors Tom Ammiano and Leland Yee, and former Supervisor Angela Alioto — have supported the ballot initiative? Why would former Mayor Frank Jordan, prominent socialite Martha Benioff, and the Harvey Milk Democratic Club have supported the initiative?"

Voters then approved the "New City Charter" as Proposition "E" in the November 1995 election. Voters did so based, in part, on a summary comparing the then-current charter to proposed charter changes that appeared in the 1995 voter guide. The summary comparison was authored by the City Attorney's Office, presumably with Ms. Renne's approval. In the "General Format" section at the start of the summary, voters were told that [voter] initiative ordinances contained in Charter appendices would "still be part of the Charter," and that "any changes to … the appendices would still require a vote of the people." Voters were also assured in the comparison that Article XIV of the Charter dealing with voter initiatives, that there would be "no changes of substance" to voter initiatives. Voters were told only that a few of the provisions would be moved to the Administrative Code. Voters were ***not*** told Ordinances would lose their hierarchical standing.

Then in 1999 — while Renne was still City Attorney — voters passed Proposition "G," the "Sunshine Ordinance Amendment" by a 58.4% margin. The 1999 voter guide's Digest describing proposed changes clearly informed voters the amendments would:

- Eliminate the City's claims of "public interest" as a sole basis for withholding records.
- Prohibit the City from withholding records solely because they reveal the "deliberative processes" of City officials.
- Prevent the City Attorney from giving confidential advice to City officers or employees on matters concerning city government ethics, public records, and open meeting laws.

Had the proposed Sunshine changes been so violative of the City Charter, why would prominent San Franciscans — such as then-Supervisors Tom Ammiano and Leland Yee, and former Supervisor Angela Alioto, who is an expert lawyer — have supported the ballot initiative? For that matter, why would former Mayor Frank Jordan; prominent socialite Martha Benioff, then co-chair of the League of Women Voters; and the Harvey Milk Democratic Club have supported the initiative? [Of interest, then-Supervisor Michael Yaki opposed the voters' Sunshine initiative. Did he oppose it because he was planning to become a paid lobbyist after leaving elected office and didn't want to face greater Sunshine?]

Had these proposed Sunshine Ordinance amendments so violated the City Charter, then-City Attorney Renne should have prevented them from being put before the voters when she reviewed the proposed initiative to assign its title and summary before signature gathering could begin. Renne could have tried to prevent them from being enacted as "unconstitutional" with respect to municipal law. She didn't do that. Retrospectively, Herrera now seeks to overturn some of the 1999 Sunshine improvements, a decade-and-a-half later.

After all, when a proposed anti-circumcision ballot initiative qualified with sufficient signatures to be placed on San Francisco's 2011 ballot three years ago, the City Attorney's Office quickly marched into Court and prevented the question from even being put before voters, claiming the proposed anti-circumcision ban would be unconstitutional.

The City Attorney's Office also prevented a citizen's initiative regarding development at the Bayview-Hunters Point that had qualified with more-than-sufficient citizen signatures to be placed on the ballot from ever making it to an actual ballot. When a City Attorney wants to stop voters at the ballot box, he or she can figure out ways to do so.

Were multiple sections of our Sunshine Ordinance in such constitutional conflict-with-the-Charter for a decade-and-a-half, the City Attorney could have — and should have — stepped in long ago to straighten out any such "trumping" problem. But he didn't. Probably because there was no cause. Now we get fairy dust, instead.

"Instead, §67.24(b)(1)(iii) 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 or alter the City Attorney's duties."

Shen asked the Appeals Court to issue a Peremptory Writ of Prohibition to compel Superior Court Judge Goldsmith to set aside and overturn his ruling granting Grossman's victory. Shen continues to assert on behalf of the City that 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 — is "invalid because it is in conflict with the Charter." Shen asserts that the attorney-client relationship applies to all communications with clients.

Shen then takes a lemming's leap of logic. He asserts that if Grossman's argument is accepted, it could prompt future efforts to prevent the City from invoking attorney-client privilege on every other "subject [area]" beyond just access to City Attorney communications seeking advice on disclosure of public records.

Goldsmith's October 25 ruling denied the City's request to strike down §67.24(b)(1)(iii). Goldsmith's *Order* indicated that issue had not properly been brought before the Court. Shen's Appeals Court filing quibbles with Goldsmith, claiming in a footnote that the City's request to "strike" that Sunshine Ordinance provision "is not precisely accurate."

Shen is playing a silly game of semantics. He now claims the City had *only* argued that the Superior Court should not grant Grossman's writ that sought production of allegedly "privileged" documents, because the Sunshine provision "purporting to abrogate the [attorney-client] privilege is trumped by the Charter." This represents Shen's fairy tale.

Shen clearly wants 67.24(b)(1)(iii) struck down. But he's reluctant to admit that's his end game.

It isn't clear how Shen's hair-splitting makes anything more precise or accurate. It's not even clear that the charter "trumps" the Sunshine ordinance. What is clear, is that the City and Herrera now desperately want §67.24(b)(1)(iii) struck down, simply because Grossman appears to be the first San Franciscan to have sought enforcement of its provisions in a court of competent jurisdiction.

But §67.24(b)(1)(iii) did not, as Shen wrongly asserted, annul or repeal attorney-client privilege with respect to whether the City Attorney could issue written communications to its clients concerning advice on compliance with open government laws. Instead, §67.24(b)(1)(iii) ***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 or alter the City Attorney's duties. It just disallows ***withholding*** from disclosure records involving a single, narrow subject area: providing City Attorney "advice" regarding open government laws. It didn't abolish attorney-client privilege on a blanket basis, as Shen's fairy tale would have a Court believe.

Shen continued to wail and rail that the attorney-client privilege and attorney work product protections "are ***presumed to be*** an integral part of the City Attorney's functions prescribed in the Charter [emphasis added]." For Shen — and presumably his boss, City Attorney Herrera — ***presuming*** that something be read into the Charter that isn't actually there, is good enough.

Shen asserts several times that §67.24(b)(1)(iii) is "void" because it conflicts with the Charter. Although Shen notes Grossman is correct that local governments are authorized under CPRA §6253(e) to adopt public records laws that provide greater access to records than prescribed by the minimum disclosure standards set forth in CPRA, Shen argues that does not mean cities are authorized to contradict their charters by adopting a "mere ordinance" [such as the

Sunshine Ordinance]. Shen concluded by asking the Appeals Court to reverse Judge Goldsmith's Superior Court ruling in Grossman's favor. Shen requested a *Peremptory Writ* on November 22, which are relatively rare and limited to situations where the Petitioner's [Shen's] "entitlement" to immediate relief is clear cut. Of significance, the Appellate Court — on its own motion — converted the Respondents' peremptory writ filing to an alternative writ, which converts the matter into a "cause" and which requires the Court to hear further arguments. Apparently, the relief Shen initially requested may ***not*** be so clear cut.

After wading through reading Shen's false nonsense, Tiny Tim's eerie falsetto, ukulele-accompanied smash hit, "Tip-Toe Through the Tulips," instantly came to mind. One can only pray that the Appeals Court also heard Tiny Tim's falsetto and ukulele rhythm in Shen's fairy tale appeal.

City's Improperly Filed Appeal

As the *Observer* reported in December, in response to the misguided and rambling *Opposition* brief Shen filed on October 9, Grossman's lawyer Michael Ng submitted a brilliant 14-page rebuttal 14-page ***Petitioner's Reply in Support of Verified Petition for Writ of Mandate*** in Superior Court on October 15. In it, Ng noted voters are the ultimate authority and can exercise plenary power over the City's legislative affairs. He also noted that it's clear Sunshine §67.24(b)(1)(iii) says City Attorney communications regarding compliance with open government laws — from the outset — are not confidential. Communications not confidential when created cannot be deemed attorney-client privileged after-the-fact.

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In response to the brief Shen filed in Appellate Court on November 22 in the City's attempt to overturn Grossman's Superior Court victory described above, Ng filed a 46-page ***Opposition to Petition for Peremptory Writ of Mandate and/or Prohibition*** response on December 23. Ng's *Opposition* brief packs a far greater wallop.

For starters, Ng notes that Shen's Appeal is more than likely void — and shouldn't even be considered by the Appeals Court at all. Ng bases this assertion on the fact that Shen's Appeal was "ostensibly filed on behalf of the Ethics Commission and its Executive Director," [John St. Croix]. Ng wrote, "The Ethics Commission has not, however, authorized this [Court] proceeding, and public records indicate that it may not even be aware it was filed." For that reason alone, Ng asserts Shen's appeal should be tossed out and not considered.

Ng notes that only the Ethics Commission itself — not Mr. St. Croix — has authority to decide whether to mount a lawsuit defense. Only the Ethics Commission can decide whether to waive the attorney-client privilege. Not St. Croix. When Grossman filed his initial complaint with the Sunshine Ordinance Task Force in November 2012 regarding the improperly withheld records, St. Croix should have placed on an Ethics Commission agenda a discussion of whether it wanted to produce the withheld records, respond to the complaint, or waive the attorney-client privilege. But no discussion of Grossman's Sunshine complaint was placed on any Ethics Commission agenda.

When the Sunshine Task Force issued its Order of Determination in Grossman's favor in June 2013 ordering St. Croix and the Ethics Commission to produce the records, St. Croix again failed to place an item on the Ethics Commission's agenda for discussion, even if only in closed session. Then, when it became clear that St. Croix was going to ignore the Order of Determination, the Sunshine Task Force referred the matter to the Ethics Commission for enforcement on September 4, 2013. Again, St. Croix placed nothing on the Ethics Commission's next agenda for discussion.

"Ng notes that Shen's Appeal is more than likely void — and shouldn't even be considered by the Appeals Court at all. … Sunshine Ordinance §67.12(a)(2) does NOT say that a policy body can delegate to a staff member decision-making to pursue litigation which a policy body is required to report out."

As a consequence, the Ethics Commission never had a chance to avoid Grossman's current lawsuit. The Commission never legally decided — independent of St. Croix — whether to waive attorney-client privilege. It failed to decide to legally authorize

defending Grossman's lawsuit. It failed to bring its own lawsuit. And none of the required steps were taken. The Commission has remained utterly silent, 15 months later.

Shen claims that as its Executive Director, St. Croix is "generally" in charge of administration of the Ethics Commission. Shen asserts the Director's administrative responsibilities include making litigation decisions involving the Ethics Commission in consultation with — of all people — the City Attorney. Certainly, St. Croix has no authority to decide whether to defend a lawsuit or to commence an Appellate Court action that could significantly affect the public's constitutional rights of access to public records, without the Ethics Commission's explicit directive to do so.

Shen tells the Appellate Court that Grossman's allegation of procedural improprieties involving filing the City's Appeal is "inapt."

Sunshine Ordinance §67.12(a)(2) does NOT say that a policy body can delegate to a staff member decision-making to pursue litigation which a policy body is required to report out from closed session in an open session. St. Croix does not hold any "closed session" authority under his own right. Clearly, §67.12(a)(2) suggests that decisions to enter into litigation must, at minimum, be determined by a policy body — not by an Executive Director — and they're required to do so only during a properly-noticed, open- or closed-session meeting of the body.

Since the Commission itself never authorized the lawsuit, small wonder Ng asserted the Court should deny Shen's Appeal outright. Although Shen argues this doesn't make the case procedurally defective, of course it is.

And it's a big deal, because not only was Shen's request to strike down §67.24(b)(1)(iii) not properly brought before the Superior Court, Shen's Appeal on behalf of St. Croix was also not properly brought before the Appellate Court, either, due to the Ethics Commission's failure to authorize the Appeal. Shen's Appeal indicates it was filed in the name of St. Croix ***and*** the Ethics Commission, but the Commission did not actually bring it.

And it's a bigger deal still, that St. Croix's lists on his Superior Court and Appellate Court filings that five City Attorney's are representing him. It's clear that §67.21(i) prohibits the City Attorney's Office from acting as legal counsel for purposes of denying access to public records, but here we have the City Attorney representing St. Croix at both the trial court and appellate court levels. The Ordinance also provides that the City Attorney cannot give confidential advice to City officers regarding ethics and public records, but that appears to be what Herrera is doing.

The Ethics Commission should have obtained independent legal counsel to represent St. Croix, rather than turning to the City Attorney, who theoretically is prohibited from doing so. This may be yet more fairy dust.

"It is doubtful that any other board or commission in the City has delegated to their respective Executive Directors decision-making authority involving lawsuits against other City departments."

Shen creatively asserts California's Brown Act only sets forth procedures to be followed ***if*** a local legislative body is actively taking action involving litigation. He asserts the Brown Act does not "interfere with decisions" about ***whether*** a legislative body such as the Ethics Commission *must* take action. Shen claims that the Brown Act has no division of responsibilities between Ethics Commission members and their Executive Director, hoping to confuse the Appellate Court about whether any decision to pursue litigation can be delegated to staff members such as St. Croix.

Shen uses this convoluted rationale to conclude that the Commission wasn't required to take a collective action to authorize defending the lawsuit because procedurally, St. Croix had ostensibly been authorized to take collective action on the Commission's behalf. The City's various boards and commissions, and the Board of Supervisors, routinely go into closed-meeting sessions to discuss anticipated litigation.

It is doubtful that any other board or commission in the City has delegated to their respective Executive Directors decision-making authority involving lawsuits against other City departments. Surely Shen and Herrera would not argue that the Board of Supervisors can delegate to its "Executive Director" — Angela Calvillo, Clerk of the Board — decision-making authority over whether to authorize lawsuits involving the Board or the City.

The 11-member Board of Supervisors would ***never*** delegate to Calvillo the authority to go into closed session with a Deputy City Attorney to approve defending or concluding a lawsuit against the Board of Supervisors or against the City. Nor would the Board permit Calvillo to do so without informing them every step of the way, progress in such a case.

Nor is it likely that Shen and Herrera would argue that Harlan Kelly, General Manager of San Francisco's Public Utilities Commission, could authorize litigation against the City or against the PUC without first obtaining approval from the PUC's own Commissioners in open or closed session.

Does Kelly ***not*** have the same authority to enter into litigation without his Commission's prior approval, that Shen asks us to believe has been "delegated" to St. Croix? Are we really expected to believe that the Ethics Commission has granted St. Croix such wide-ranging latitude typically not granted to other City departments and commissions?

Is Shen telling the Appellate Court that since St. Croix may have decided the collective-action "whether" side of the equation himself — making it unnecessary for the Ethics Commission to independently determine "whether" to collectively defend themselves on actual, not anticipated, litigation, since they were formally named in the lawsuit — that "whether" now somehow trumps "if"?

Are we really expected to believe the Ethics Commission is the *single* City commission that does ***not*** hold closed session meetings to approve filing actual litigation in a court of law?

"Although the City concedes that the records Grossman requested fall within the scope of §67.24(b)(1)(iii), Shen and the City suddenly claim on appeal that this Sunshine provision is invalid because it conflicts with City Charter sections 6.100 and 6.102. Ng notes there is no such conflict."

In the end, what we have here is the City Attorney's Office wastefully running up legal costs on the taxpayer's dime in a case that was improperly brought before the Appellate Court. No two ways around it.

Is Sandbagging in Herrera's "Kit Bag"?

Ng notes that the Appeals Court should give wide deference to Grossman, since the City, Shen and St. Croix had not raised "the defenses on which they now rely until ***after*** Grossman filed a mandamus action in the Superior Court."

This is particularly true since the Sunshine Ordinance Task Force is a non-partisan, quasi-judicial body created to scrutinize compliance with open records laws. Even the Ethics Commission appears to have acknowledged the SOTF is a quasi-judicial body.

By the time the Sunshine Task Force issues an Order of Determination ruling on access to public records, hearings have already been held at which both parties in a records-access dispute have been afforded ample opportunity to present their cases. At the point an Order of Determination is issued ordering City agencies to comply with the Sunshine Ordinance, a complaint in dispute has been deemed meritorious by the Task Force. Due process has then already concluded.

Although the City concedes that the records Grossman requested fall within the scope of §67.24(b)(1)(iii), Shen and the City suddenly claim on appeal that this Sunshine provision is invalid because it conflicts with City Charter sections 6.100 and 6.102. Ng notes there is no such conflict. Ng suggests that if the Appeals Court tolerates such "sandbagging," it would encourage dragged-out litigation, encumbering the judicial system.

"Sandbagging" has a special meaning in legal contexts. Black's Law Dictionary defines *sandbagging* as "a trial lawyer remaining cagily silent when a possible error occurs at trial, with the hope of preserving an issue for appeal if the court does not correct the problem." Trial lawyers are not supposed to notice — but then ***not mention*** — possible trial errors in the hope of using the error as the basis to mount an appeal should they lose at trial.

Who knew the City Attorney's Office may use "sandbagging" as part of its legal kit bag?

Sandbagging is a well recognized legal term in Court briefs, and a word used by U.S. Supreme Court justices in their written opinions. Justice Antonin Scalia defined sandbagging as "suggesting or permitting, for strategic reasons, that the trial court pursue a certain course, and later — if the outcome is unfavorable — claiming that the course followed was a reversible error." Justice Thurgood Marshall noted that the Sixth Circuit's rules preclude appellate review of any issue not contained in objections, to prevent a litigant from "sandbagging" a district judge by failing to object and then appealing.

"Ng notes there is no conflict between the Sunshine Ordinance and the City Charter. The two laws can be read in perfect harmony, he says."

Didn't Herrera or Shen learn in law school that Appeals Courts hate sandbagging? How many plaintiff's have brought suit in San Francisco without realizing that Herrera's team may be all too willing to pull *sandbagging* out of their kit bags? Could any overworked Appeals Court judges have been sandbagged by Herrera's team and not been aware it may have happened?

Ng notes there is no conflict between the Sunshine Ordinance and the City Charter. The two laws can be read in perfect harmony, he says. Ng observes the Charter is "silent with respect to the confidentiality of communications with the City Attorney," and that no provision in the Charter mandates that such communications — or ***all*** communications — take place within the boundaries of attorney-client privilege. Shen and Herrera apparently want the Appeals Court to read into the Charter's ***silence***, a new blanket requirement that all communications are confidential, even though the Sunshine Ordinance is not incompatible with the Charter's designation of privilege.

Ng notes that the Brown Act stipulates that when advice from an attorney is being sought or provided that does ***not*** concern *pending* litigation, the attorney-client communication must be in public. The California Legislature made it clear that the relationship between a municipal body and its attorney does not *require* confidentiality. Advice outside the context of pending litigation must be carried out in full view of the public. In Arkansas, the attorney-client privilege is not allowed as an exemption to the state's Freedom of Information Act.

Both Vallejo and Milpitas have local Sunshine laws like San Francisco's that included eliminating the attorney-client privilege with respect to public records access laws.

The Brown Act appears to be clear that "pending" litigation does not mean the same thing as "threatened" litigation, or the "risk of" potential litigation. Both of the latter could mean almost anything. "Pending litigation" is commonly understood as litigation actually pending in a court of law. Sunshine Ordinance §67.10(d)(1) defines *pending litigation* as when an adjudicatory proceeding before a court has been formally initiated [filed].

"Herrera's own so-called 'Good Government Guide' states that 'The Sunshine Ordinance provides that notwithstanding any exemption [permitting withholding of records] provided by law, any written legal advice about conflicts or open government laws may <u>not</u> be withheld from disclosure.'"

Everyone understands attorney-client privilege is necessary during "pending litigation." But everyone also knows, or suspects, that hiding behind the "risk of litigation" is commonly perceived to be misguided officials hoping that government secrecy might shield them.

In Grossman's case, the records he sought were not privileged from the outset. They didn't involve pending litigation. Shen's and the City's flawed argument that a lawyer's obligation to his client is to maintain confidences does not convert non-confidential communications into confidential ones. That's fairy dust.

The City has known for over 13 years that the Sunshine Ordinance adopted by voters specifically deemed that the types of records Grossman sought are not protected from disclosure. For nearly a decade and a half, Shen and Herrera had to have known they can't use magic dust to convert a non-confidential document into one rebranded confidential.

Neither State law nor the Rules of Professional Conduct for lawyers mandate that all communications are privileged. The communications Grossman sought in this case are not "privileged." Neither State law nor legal professional guidelines create a privilege, where one hadn't otherwise existed.

Shen contends §67.24(b)(1)(iii) prevents the City Attorney from carrying out his duties. Ng notes this is a gross exaggeration. There is nothing in §67.24 that dictates any relationship between the City Attorney and his clients.

Ng notes that Dennis Herrera's own so-called "Good Government Guide" states that "The Sunshine Ordinance provides that notwithstanding any exemption [permitting withholding of records] provided by law, any written legal advice about conflicts or open government laws may ***not*** be withheld from disclosure in response to a public records request" [emphasis added].

"Shen cited a number of lawsuits involving attorney-client confidentiality in the case law. … Many of these cases do not really deal with issues Shen and Herrera claim they do. Several cases do not state what the City Attorney claim they do."

Herrera's Good Government Guide admission is a signal Grossman is right on the law. Hopefully, the Appellate Court will take judicial notice that Herrera's Good Government Guide agreed 100% with Grossman on this point.

Importantly, while the City is now stridently pursuing having §67.24(b)(1)(iii) struck down, the City has not attacked other provisions in §67.24 that also ***exclude*** using other exemptions to permit withholding of documents. Inexplicably, rather than trying to strike down ***all*** of §67.24, the City is asking the Appeals Court to strike down only §67.24(b)(1)(iii). Ng asserts "it would be a gross expansion of the privilege doctrine and would undermine its structure by shifting the burden for proving confidentiality," should the Appeals Court agree with Shen.

Shadowboxing With Case Law

In an exercise of shadowboxing, Shen extols the virtues of protecting confidentiality as a justification for asserting an alleged privilege to withhold the documents. Ng notes none of the virtues of confidentiality require that every communication between an attorney and his client be [magically] deemed confidential. Nor do the virtues mandate that the communications at issue in this case —regarding advice involving access to public records — be deemed privileged.

Is Shen shadowboxing, practicing to stay fit?

Shen cited a number of lawsuits involving attorney-client confidentiality in the case law, including "*Currieri v. City of Roseville*," "*Roberts v. City of Palmdale*," "*Citizens for Ceres v. Superior Court*," "*Welfare Rights Org. v. Crisan*," "*Domar Electric, Inc. v. City of Los Angeles,"* "*Scott v. Common Council of the City of San Bernardino,"* and "*Sacramento Newspaper Guild v. Sacramento County Board of Supervisors*." Many of these cases do not really deal with issues Shen and Herrera claim they do. Several cases do ***not*** state what the City Attorney claim they do.

"Shen argues that the Court should believe that an unstipulated 'implication' in the City Charter passed by voters four years earlier can 'trump' the very clear statement made by voters in the Sunshine Ordinance that says the exact opposite."

Ng notes many of the cases are *inapposite* — inappropriate, inapplicable, or irrelevant to the issues that are before the Court in Grossman's lawsuit.

Some observers have questioned whether the City Attorney truthfully interpreted the case law it cited to the Appeals Court. Hopefully, the judges will closely examine whether Shen truthfully presented the case law in the proper context, since Ng clearly demonstrated that many of these cases are inapt to the circumstances in Grossman's lawsuit.

The City and Shen cite the *Currieri* case hoping to convince the Appeals Court that courts have long recognized that when interpreting statutes "whatever is necessarily ***implied*** in a statute is as much part of it as that which is expressed" [emphasis added]. That's it. Shen would have the Court believe that this "rule of necessary implication" extends to city charters, and that voters who passed changes to San Francisco's City charter in 1995 must have impliedly ***intended*** to make all City attorney-client communications privileged and confidential — despite the fact that voters had not actually, explicitly, or even "impliedly" said so.

In fact, the 1995 City Charter changes didn't explicitly ask voters to weigh in on the issue. Shen's fall-back position is that voters must have *intended* — or implied — something they hadn't even been asked in the question put before them at the ballot box.

Despite the clear articulation in the Sunshine Ordinance adopted by voters in 1999 that the City Attorney is ***not*** permitted under §67.24(b)(1)(iii) to withhold disclosing the records in dispute, Shen argues that the Court should believe that an unstipulated "implication" in the City Charter passed by voters four years earlier can "trump" the very clear statement made by voters in the Sunshine Ordinance that says the exact opposite. For Shen and his boss Dennis Herrera, a Charter "implication" may be all that is necessary to "trump" more precise language contained in the Sunshine Ordinance.

The *Roberts v. City of Palmdale* case involved attorney-client privilege in the context of pending litigation. It is inapplicable here because there was no pending litigation involving the records Grossman sought. The *Roberts* case is also inapt, in part, because the question considered by the Court was whether city attorney advice distributed by mail prior to a meeting created an illegal closed-door meeting, thus waiving attorney-client privilege. There was no question in *Roberts* that attorney advice would have been confidential if it had been presented during a closed-session meeting. The question the *Roberts* Court decided was whether the advice distributed by mail created an illegal closed-session meeting that automatically waived the confidentiality privilege. Shen's reliance on *Roberts* completely misses the point of whether privilege had been created, which is the issue in Grossman's case.

The *Roberts* Court never considered the issues raised in Grossman's case, and *Roberts* has no bearing on the facts in Grossman's case. The scope of disclosure mandated by the CPRA is not at issue in his case. Instead, what is at issue in Grossman's case is the scope of disclosure required by the Sunshine Ordinance. While *Roberts* may provide that the records at issue in Grossman's case need not be produced under the CPRA, the Sunshine Ordinance states that they must be.

In *Citizens for Ceres*, the Court cautioned that when justices are interpreting statutes that might expand or limit "privilege" exemptions, they are required to do so cautiously, since they are forbidden from creating privilege or establishing exceptions to privilege using case-by-case decision making. In Grossman's case, the City's appeal seeks to have the Court create a new privilege. A privilege that doesn't necessarily exist, otherwise.

"The *Citizens for Ceres* Court cautioned that when justices are interpreting statutes that might expand or limit 'privilege' exemptions, they are required to do so cautiously, since they are forbidden from creating privilege or exceptions to privilege using case-by-case decision making. In Grossman's case, the City's appeal seeks to have the Court create a new privilege."

In the *Welfare Rights Org.* case, the attorney-client privilege was contextual and grounded in a specific need. This is unlike Shen's current argument that ***all*** communications between the City Attorney and his clients are privileged, regardless of context or a specific need. The *Welfare Rights Org.* case involved a Welfare and Institutions statute that allows non-attorneys to represent a welfare recipient at a hearing and determined that representative-client confidentiality was implied. The case didn't rule that it needs to be implied in, or applied to, other situations.

Indeed, the California Supreme Court's *Welfare Rights Org.* ruling provides no guidance to answer the question of whether attorney-client communications are entitled to privilege "generally," or whether they are "always and necessarily" confidential.

In his Appeals Court brief, Shen claimed on behalf of the City that the *Domar Electric, Inc. v. City of Los Angeles* case ruled that Charter City's such as San Francisco may not act in violation of their charters. Shen claimed Sunshine §67.24(b)(1)(iii) violates the Charter. But the *Domar* case only involved a competitive bidding process for bidders on city contracts. The *Domar* Court ruled there was no conflict between the proposed bidding process and the city's charter. Ng notes that the Sunshine Ordinance is also not in conflict with San Francisco's charter. Shen's reliance on the *Domar* case is, therefore, inapt.

Shen cited the *Scott v. Common Council of the City of San Bernardino* case to argue that only voters can change a city attorney's duties by amending a city's charter. Shen argued that voters had set the City Attorney's duties in San Francisco's charter and asserted that Sunshine Ordinance §67.24(b)(1)(iii) changed the City Attorney's charter-defined

duties — a claim patently untrue. §67.24(b)(1)(iii) does no such thing; it doesn't involve changing San Francisco's City Attorney duties. The section *only* requires that a single category of documents — advice provided by the City Attorney to its city "clients" regarding CPRA, the Brown Act, and the Sunshine Ordinance — are subject to full disclosure. They must be made available for public review. That takes them out of the realm of "privilege." Ng notes §67.24(b)(1)(iii) does ***not*** conflict with any City Attorney duties set out in the Charter. There's nothing anywhere in the Sunshine Ordinance that changed even ***one*** of the City Attorney's duties.

"Regarding the *Sacramento Newspaper Guild* case, Shen and the City Attorney misplace its significance and do exactly the ***opposite* of what the Court had warned against. The Court held in this case that 'public board members sworn to uphold the law, may ***not*** arbitrarily or unnecessarily inflate confidentiality for the purpose of deflating the spread of the public meeting law.'"**

Regarding the *Sacramento Newspaper Guild* case, Shen and the City Attorney misplace its significance and do exactly the ***opposite*** of what the Court had warned against. The Court held in this case that "public board members [who are] sworn to uphold the law, may ***not*** arbitrarily or unnecessarily ***in***flate confidentiality for the purpose of ***de***flating the spread of the public meeting law [emphasis added]." The Court warned in the *Sacramento Newspaper Guild* case that neither the "happenstance of some kind of [pending] lawsuit" nor the presence of a City attorney may serve as a pretext for secret consultations whose revelation will ***not*** injure the public interest. The Court warned against the broad and limitless assertion of "privilege" to defeat specific mandates requiring that public information remain available to members of the public. Shen — acting for his masters — attempted to both inflate the need for confidentiality, and confound public interest legislative functions.

In yet another case, *Stockton Newspapers, Inc. v. Members of Redevelopment Agency*, a California Appellate Court ruled that there are no exemptions when the purpose of communications with an attorney involves a *legislative* commitment, a provision sometimes referred to as the "legislative abrogation of the attorney-client privilege."

No unfair advantage would have been conferred by giving the public an insight into the City Attorney's views on successive iterations of the Ethics Commission's proposed draft regulations, which were akin to a legislative function. Why is St. Croix so desperately trying to withhold from Grossman the City Attorney's mere "views"?

It would be a travesty if the Appellate Court relied on whether the City Attorney and Shen have truthfully interpreted case law. Observers suspect the City hasn't truthfully presented the case law. Hopefully, the Appeals Court will neither invalidate the Superior Court's ruling in Grossman's favor, nor invalidate our Sunshine Ordinance statute passed by citizen initiative, without first reading the case law that Shen and Herrera so badly misrepresent, damaging their credibility.

"Shen tried to diminish Mr. Ng's observation that Herrera's own Good Government Guide acknowledges certain legal advice written by the City Attorney may be disclosable under the Sunshine Ordinance. Shen claims the Good Government Guide's acknowledgement was a 'mere warning' to the City Attorney's clients and was not a 'concession' by the City Attorney that §67.24(b)(1)(iii) is consistent with the Charter."

It bears repeating that Ng's December 23 response to Shen's November 22 appeal was a brilliant legal analysis. Hopefully the Appeals Court will rule Ng and Grossman are right on the law.

Inappropriate Condescension

If Shen's 20-page *Respondents Opposition* filed October 9, 2013 in Superior Court and if his 42-page *Petition for Peremptory Writ* filed in Appeals Court November 22 seeking to overturn Grossman's Superior Court victory weren't bad enough, Shen's 22-page ***Reply to Opposition to Petition for Peremptory Writ of Mandate and/or Prohibition*** filed on January 14, 2014 sinks to a new low, stooping to a heavy dose of inappropriate condescension. Appellate Court justices can't miss that Shen insults Grossman as a person at every opportunity.

For openers, Shen discovered the word "mere" and used it at least seven times, including branding the Sunshine Ordinance a "mere ordinance" five times. It's Shen's effort to belittle the hierarchy of ordinances in local government.

In an exercise of hairsplitting, Shen tried to diminish Mr. Ng's observation that Herrera's own Good Government Guide acknowledges certain legal advice written by the City Attorney may be disclosable under the Sunshine Ordinance. Shen tries to throw sand in the eyes of the Appeal Court by claiming that the Good Government Guide's acknowledgement was a "mere warning" to the City Attorney's clients and was not a "concession" by the City Attorney that §67.24(b)(1)(iii) is consistent with the Charter. By reducing the clear meaning of the text in the Good Government Guide to a "mere warning," Shen seeks to fool the Court into believing it is ***not*** an admission the provision is valid.

Shen also denigrates the role of voters who hold the ultimate plenary power over the City's legislative affairs. The communications Grossman sought in this case involve Ethics Commission procedural regulations that were being vetted as a legislative function over which voters should have some control, or at least input. But Shen reduces the development of the regulations to "mere policymaking," as if of no interest or consequence to voters.

While Shen argues development of policy regulations is "mere" policy-making, he nonetheless wants to elevate the policy-making to the same standard of protected attorney-client privilege provided for cases involving litigation.

Elsewhere, Shen denigrates Grossman several times and felt compelled to tell the Appeals Court that Grossman had previously sued the City over Sunshine matters, perhaps to paint Grossman as a repeat litigant. Although Shen failed to tell the Court the previous matter had been settled in Grossman's favor, Shen blabbed to the Court that Grossman had "ghostwritten" a memo for the Sunshine Ordinance Task Force submitted to the Ethics Commission regarding the proposed regulations.

Shen babbled, "The fact that the Task Force is allowing private citizens to ghostwrite memoranda for it underscores the emptiness of Grossman's suggestion that the Task Force is entitled to deference."

First, "ghostwriting" is hardly a crime. If it were, thousands of current and former mayors, presidents, and kings and queens would be guilty of hiring ghostwriting speechwriters. Why hasn't Shen asked former Mayor Willie Brown if the long-running rumor is true that Brown's column in the *Chronicle* has been ghostwritten by another prominent *Chronicle* columnist all along?

"Shen continues to mislead the Appeals Court that the Sunshine Task Force is a 'purely advisory body.' The Sunshine Task Force is not a 'mere' advisory body; it's a quasi-judicial body. The Task Force's primary mission is to adjudicate disputes involving access to public records. This makes it, if nothing else, an adjudicatory body — at a minimum — not a 'purely advisory body,' as Shen brazenly and wrongly deconstructs."

Second, Shen withholds from the Court information that the Task Force members are all private citizens in their own right. They are entitled to consult and work with other private citizens, such as Grossman. There is no rule prohibiting the Task Force from seeking advice from experts such as Grossman, who is a lawyer dedicated to public records and public access law.

Third, Shen fails to inform the Court that the Sunshine Task Force — on the record and during public meetings — had asked its own Deputy City Attorney, Jerry Threet, to help draft a response to the Ethics Commission concerning the proposed regulations being developed by Ethics. Threet declined to help, saying SOTF would need to obtain approval for him to work overtime developing a response. Threet — like Shen — is expert at using Herrera's fairy dust.

Shen also failed to inform the Court that Threet had declined to attend a joint hearing between the Ethics Commission and the SOTF. Threet lamely claimed it might have been a conflict of interest for him to do so. He was supposed to be operating under an "ethical wall" separating him from his boss, the City Attorney, and his client, the SOTF. Shen also omits informing the Court that the comments Grossman provided as a "ghostwriter" were made during open, public meetings of the SOTF.

Shen wailed that the Task Force had taken "nearly a year" to provide comments and feedback on the Ethics Commission's proposed draft regulations. But Shen failed to inform the Court that the reason the Task Force hadn't met for nearly six months between July and November 2012 was because the Board of Supervisors had refused to appoint new members to the Task Force.

Without a quorum, the SOTF wasn't permitted to meet to conduct business. The delay providing feedback wasn't because the Task Force was simply dragging its feet in 2012 on the Ethics Commission's proposed regulations, as Shen wrongly implies. The Task Force was simply prohibited from meeting and conducting business. Shen's claim that St.

Croix had determined it wouldn't be "useful nor efficient" to send further drafts of the proposed regulations to the Task Force for additional feedback also deceived the Appeals Court.

Misleading the Appellate Court

Shen continues to mislead the Appeals Court that the Sunshine Task Force is a "purely advisory body." The Task Force was established to implement and carry out certain aspects of San Francisco's Sunshine Ordinance and the CPRA. By claiming the SOTF is "merely" an advisory body, Shen and Herrera are trying to persuade the Court that the Task Force has no authority to issue ***any*** Orders of Determination to ***any*** City department ordering compliance with the Sunshine Ordinance. The Sunshine Task Force is ***not*** a "mere" advisory body, it's a quasi-judicial body. Shen and Herrera must surely know this. And if they don't, they should consider resigning their jobs.

The Task Force is specifically empowered by the Sunshine Ordinance to determine where there have been violations of the Ordinance. It is also empowered by the Sunshine Ordinance to "order" production of records improperly withheld.

Shen fails to tell the Appellate Court that Sunshine Ordinance §67.21(e) specifically provides that if the Sunshine Task Force determines a record is a public record, it shall [must] order the Custodian of the record to comply and produce it. He also fails to inform the Court that §67.21(f) goes on to state that any other administrative remedies — in addition to the Task Force's administrative remedy provided in §67.21(e) — shall in no way limit the availability of other administrative remedies, nor shall administrative remedies provided by this section in any way limit the availability of judicial remedies.

Shen fails to inform the Court of §§67.21(e) and (f), precisely to obscure that the Task Force does not issue mere "advisory opinions." The Task Force issues what are, essentially, binding orders of administrative, quasi-judicial remedies. After all, the Task Force's primary mission is to adjudicate disputes involving access to public records. This makes it, if nothing else, an adjudicatory body — at a minimum — not a "purely advisory body" as Shen brazenly and wrongly deconstructs. Shen appears to hope the Court won't notice this.

Shen's nonsense that the SOTF is merely an "advisory body" is based on §67.30(c) of the Ordinance, which outlines the SOTF's ***separate*** duties to provide "advice" to City agencies. But Shen creatively elided telling the Appellate justices that §67.21(e) clearly stipulates that the SOTF has responsibilities to "order production" of public records, making it an adjudicatory body with power to issue orders, in addition to offering "advice."

"Remarkably, Shen noted 'The City agrees with Grossman that the Sunshine Ordinance is best understood not as a "waiver" but as an attempt to bar assertion of [attorney-client] privilege in the future by the City Attorney's clients.' One has to wonder when Shen thinks 'in the future' should commence."

Like all of us who wear multiple hats — roles as father, son, uncle, brother, or wife, mother, daughter and perhaps doctor — the SOTF wears multiple hats.

At the municipal agency level, take the Department of Public Health, which wears many hats providing trauma care, primary care, long-term care, and environmental health, among others. Or take the MTA, which provides bus services, oversees taxis, and has its parking and traffic control duties. Shen sprinkled fairy dust on the Appellate justices to obfuscate the SOTF's standing as an adjudicatory body, claiming the SOTF has a single role — merely to provide "advice."

In his January 14 *Reply*, Shen now claims that the *Roberts vs. City of Palmdale* case did not apply only to communications made in anticipation of ***pending*** litigation, it applies to any legal advice even when no litigation is threatened, since "governmental policymaking, particularly on cutting-edge issues, often results in litigation [emphasis added]." Shen elevates potential "litigation risk" to new heights, suggesting that the mere ***risk*** of future litigation somehow justifies total secrecy with respect to attorney-client communications involving mere regulations-making. Shen makes the NSA took tame by comparison.

And Shen fails to tell the Appellate Court that the Sunshine Ordinance specifically provides in §67.24(b)(2) that "when litigation is finally adjudicated or otherwise settled, ***records of all communications*** between the department and the adverse party shall be subject to disclosure, including the text and terms of any settlement," unless otherwise privileged under California law. Not only were the records Grossman sought ***not*** protected by privilege (since not confidential at the outset), City attorney advice in the Ethics Commission's and St. Croix's department records involving this case may also not be protected at the conclusion of Grossman's lawsuit, either.

Remarkably, Shen noted at the conclusion of his January 14 brief, that "The City agrees with Grossman that the Sunshine Ordinance is best understood not as a 'waiver' but as an attempt to bar assertion of [attorney-client] privilege in the future by the City Attorney's clients." Since Shen agrees with Grossman on this point, one has to wonder when Shen thinks "in the future" should commence. After all, we're approaching the 15th anniversary of passage of the 1999 Sunshine Ordinance amendments. How much longer does Shen want "in the future" to wait? Or to begin?

Shen ended on a thud, claiming the City Attorney's relationship with its clients is protected by state-law privilege and work product doctrine. Shen makes this wild fairy-dust claim after previously all but admitting to the Court that of the 24 documents withheld from Grossman, none involved City Attorney work-product records. They only involved attorney communications.

"§67.21(i) goes on to state that 'all communications with the City Attorney's Office with regard to this ordinance, including petitions, requests for opinion, and [actual] opinions shall be public records.' All the Appellate justices need to do is to carefully read §67.21(i) to know Shen is wrong and elided key information."

Shen also misleads the Court by omission. For starters, Shen fails to address that §67.21(i) prohibits the City Attorney from acting as legal counsel to City agencies for purposes of denying access to public records. Indeed, §67.21(i) specifically states the City Attorney ***shall*** [must] act to protect and secure the rights of the people of San Francisco to access public information and public meetings and ***shall*** [must] ***not*** act as legal counsel to deny access to public records.

§67.21(i) goes on to state that "all communications with the City Attorney's Office with regard to this ordinance, including petitions, requests for opinion, and [actual City Attorney] opinions shall be public records." All the Appellate justices need to do is to carefully read §67.21(i) to know Shen is wrong and elided key information. And that Ng and Grossman are right on the law.

Emperor's New "Good Government Guide" Clothes

An aside about Herrera's Good Government Guide is in order.

Perhaps ironically, the City's ethics laws require that even members of San Francisco's Sunshine Ordinance Task Force must take annual training on provisions of the Sunshine Ordinance, training required of all City employees required to file statements of economic interest on annual FPPC Form 700's.

The training is conducted by the City Attorney's Office, relying heavily on Herrera's Good Government Guide, which claims to be a guideline to educate City employees and elected officials about our local Sunshine ordinance, California's Public Records Act, and the state's Brown Act.

But former members of the Sunshine Ordinance Task Force who were required to attend these training sessions — and spoke on condition of anonymity — note that the training sessions never acknowledge the Sunshine Task Force's key role as an adjudicatory body in disputes involving access to public records.

Indeed, several Task Force members report their impression is the training sessions subversively teach City employees how to defend themselves against Sunshine violations, rather than on how to transparently comply with the Ordinance.

"If multiple sections of the Sunshine Ordinance are struck down by the Appellate Court, it would permit the City Attorney and his City clients to keep secret all communications regarding public records access issues."

Herrera's Good Government Guide includes a comprehensive section regarding the Sunshine Ordnance. Rita O'Flynn — who as a private citizen was previously forced to sue, but is not currently making any claims against the City — reviewed an employee training session on the Good Government Guide hosted by the City Attorney's Office.

She notes that although the City Attorney's Office maintained during her Sunshine Task Force complaint hearings — and later in Court filings — that it had provided her with all responsive e-mails she had requested, the Good Government Guide may have helped the City from providing full transparency.

The Sunshine Task Force ruled in O'Flynn's favor, finding that the City had improperly withheld records from her. When the Task Force referred her complaint to the Ethics Commission for enforcement, Ethics simply denied her complaint, indicating that its "investigation" showed that the City had provided all records responsive to her requests.

Astoundingly, during formal litigation the City subsequently turned over approximately 16,000 pages of additional, directly responsive e-mails and documents that the City had claimed during Task Force hearings didn't exist. The City finally provided them only during the discovery phase of litigation, after she was forced to file a costly lawsuit.

How could the City Attorney's Office have so mislead both the Sunshine Task Force and the Ethics Commission that O'Flynn had been provided all responsive public records during adjudicatory hearings, and only later coughed up 16,000 pages of documents it repeatedly and adamantly claimed hadn't existed? How does the Ethics Commission now explain its dismissal of O'Flynn's case, after 16,000 pages "magically" turned up? Perhaps fairy dust can explain it.

So much for the City Attorney's "transparency," given it grossly mislead the Task Force during O'Flynn's hearings.

"This should tell us how City employees view the Sunshine Ordinance," O'Flynn notes. "Basically, it's just a pain in the ass to them and nothing more," she adds.

What's At Stake?

If the City's appeal on behalf of St. Croix is successful, the public's ability to monitor the City Attorney's advice and assistance to officials, policy bodies, and other City units regarding this single subject area — narrow access involving City Attorney communications on records access law — would be seriously impaired. If the public's ability to access those records were blocked, members of the public would be at a great disadvantage when contesting City officials' refusal to disclose other records based on that advice.

Should Shen prevail, there may well be irreparable damage to the public's ability to access public records in San Francisco, since it is likely all other City agencies, officials, departments, and policy bodies may resist records requests that involve the City Attorney's "advice."

Should the City persuade the Appellate Court that §67.24(b)(1)(ii) is not enforceable and should be struck down, other sections of the Sunshine Ordinance may also be in jeopardy. And local Sunshine laws around the state may face jeopardy.

It may invalidate the provision in §67.21(i) that requests for opinions to the City Attorney, and the City Attorney's actual opinions to City departments and employees are, in fact, public records. It could invalidate provisions in §67.24(g), (h), and (i) that currently bars the City from claiming "deliberative process" and various "privilege" exemptions in CPRA §6255 to justify withholding public records that are otherwise required to be disclosed.

If multiple sections of the Sunshine Ordinance are struck down by the Appellate Court, it would permit the City Attorney and his City clients to keep secret all communications regarding public records access issues. It would permit the full weight of the City Attorney's Office to be used to defend errant City employees and departments against citizen Sunshine complaints, which the City Attorney is currently barred from doing.

This appears to be Shen's and Herrera's end game: To completely strip the Sunshine Task Force of its ability to order City departments and City employees into compliance with the Sunshine Ordinance.

"Ironically, Herrera stated, 'We City officials take seriously our duty to protect transparency in our legislative process.'

If that were true, why is Shen — on behalf of Herrera — trying so stridently to block the transparency of the legislative process involving the Ethics Commission's regulations by appealing Grossman's Superior Court victory?"

Ng adroitly notes the public's right of access under California's Public Records Act (CPRA) operates as a "floor," not as a "ceiling." CPRA authorizes local governments to adopt requirements permitting greater access to records than prescribed by minimum State standards. That's all §67.24(b)(1)(iii) does. It permits greater access.

San Francisco voters expressly authorized the Ordinance's provision in order to "shrink one of the islands of privacy by precluding San Francisco [government] agencies from invoking certain statutory exceptions for public records." But only within certain narrowly-defined subject areas, limited to laws governing ethics and public records access.

Shen conflates this narrow subject area with his "the sky is falling" drama before the Court, misleading the justices.

Grossman sought communications providing City Attorney advice involving disclosure of public legislative records. Shen claims requiring the City Attorney to do so will open the door to others seeking City Attorney communications involving every other legal subject area. Ng shredded Shen's claim.

Given that the 1995 voter guide stated citizen initiatives moved to Charter appendices could only be changed by the voters, why is the City asking the Appellate Court to strike down sections of the Sunshine Ordinance rather than asking the voters to amend the Ordinance?

As the *San Francisco Chronicle* reported in "**Ex-supe Settles Lawsuit**" on February 21, the $75,000 fine against former Board of Supervisor Michael Yaki involving 70 instances of lobbying violations involved Herrera wanting to send "a strong message that the San Francisco Lobbyist Ordinance has teeth."

Ironically, Herrera stated, "We City officials take seriously our duty to protect transparency in our legislative process." If that were true, why is Shen — on behalf of Herrera — trying so stridently to ***block*** the transparency of the legislative process involving the Ethics Commission's regulations by appealing Grossman's Superior Court victory?

"Is Herrera cherry-picking which aspects of transparency, which City Ordinances, and which legislative functions City officials will take seriously as their duty to protect?"

Is Herrera cherry-picking which aspects of transparency, which City Ordinances, and which legislative functions City officials will take seriously as their duty to protect? It will be interesting to eventually learn how much Herrera spent to ***protect*** transparency in Yaki's case, versus how much Herrera has spent to ***prevent*** transparency in Grossman's case. More than likely, the serious spending will have been wasted trying to prevent Grossman's Superior Court victory.

Shen's and Herrera's "fear mongering" is designed to distract the Court and drown out facts in Grossman's case. It's an age-old trick: Scream scary analogies often and loudly. Toss in handfuls of fairy dust. Stir in sandbagging. These bait-and-switch tactics are designed to make the Appeals Court panic, by confounding issues before the Court.

Hopefully, we'll see in Ng's final brief due in Appellate Court on March 7 another brilliant dissection of Shen's fairy tale. But brace for Shen likely tossing out more fairy dust in his final brief due March 31.

Herrera's End Game

The Sunshine Ordinance specifically requires a narrow reading of the City charter. §67.1 notes there are rare circumstances permitting the business of government to be conducted in secret, and those circumstances should be narrowly defined to prevent public officials from abusing their authority. In the end, Grossman's lawsuit involves St. Croix's and the Ethics Commission's "secret" communications with the City Attorney regarding draft regulations. Does Herrera want to prevent the ***loss*** of abuse-of-authority for public officials and the ***loss*** of his attempts at secrecy?

"The fairy dust — that all City Attorney communications involving advice on compliance with open government laws must be deemed confidential — must end."

The CPRA authorized localities to adopt requirements for greater access to records than CPRA's minimum standards, which voters did when they adopted the 1999 Sunshine amendments. Shen all but ignores that whatever the hierarchical relationship between general provisions in the City charter and a detailed, specific enactment by voter initiative, the fact that the pertinent section — §67.24(b)(1)(iii) — was authorized by express state law makes Shen's debate that the charter "trumps" an ordinance of no significance. Hopefully, the Court will take judicial notice of this lack of significance.

The City is arbitrarily seeking to inflate the necessity for confidential communications in a case that only involves development of legislative regulations. The fairy dust — that all City Attorney communications involving advice on compliance with open government laws must be deemed confidential — must end.

Instead of invalidating §67.24(b)(1)(iii) as Shen requests, perhaps the Court should rule that San Francisco's charter may be in conflict with CPRA, and the charter should be amended.

Hopefully, the Appellate Court will rule Grossman and Ng are right on the law, and will ignore the fairy dust from Herrera and Shen.

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Full Disclosure: Much of the material reported in this article was contained in the legal briefs filed in Court. The opinions expressed are solely those of this author.