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August 3, 2014

Angela Calvillo

Clerk of the Board

San Francisco Board of Supervisors

1 Dr. Carlton B. Goodlett Place

San Francisco, CA 94102

John St. Croix

Executive Director

San Francisco Ethics Commission

25 Van Ness Avenue, Suite 220

San Francisco, CA 94102

Re: Second Violation of Statement of Incompatible Activities (SIA) by Sunshine Ordinance Task Force Member David Pilpel

Dear Ms. Calvillo and Mr. St. Croix,

The initial June 22 complaint reporting that David Pilpel violated the Statement of Incompatible Activities applicable to Sunshine Ordinance Task Force members noted that Mr. Pilpel had not applied for a waiver (a.k.a., an Advance Written Determination) from either the Clerk of the Board of Supervisors, or from the Ethics Commission, to permit him to testify before the Ethics Commission on Sunshine complaints referred by the full Task Force for enforcement by the Ethics Commission.

Mr. Pilpel did *not* seek an Advance Written Determination that testifying to the Ethics Commission about a Sunshine Complaint adjudicated and finalized by the full Task Force is *not* incompatible with his official duties.

The underlying issue is not whether Mr. Pilpel is permitted to speak before other policy bodies on issues *outside* the scope of his duties as a member of the Sunshine Task Force (for example speaking during a meeting of a Commission considering a land use matter that might affect Mr. Pilpel's neighborhood). Instead, the underlying issue is whether Pilpel is permitted to speak to another policy body on issues that are *inside* the scope of his duties as a Sunshine Task Force member (i.e., speaking about a matter inside the scope of his duties, *after* the full Task Force had concluded the matter and referred it to the Ethics Commission for enforcement).

When Mr. Pilpel voluntarily became a member of the Task Force, he was automatically bound under the governing SIA to restrict his testimony on matters falling *inside* the scope of his duties before other bodies. As a member of the Task Force, he has a duty to support and abide by decisions reached by a majority of Task Force members.

If Pilpel is unwilling or unable to comply with SIA provisions restricting his Free Speech rights regarding issues *inside* the scope of his duties, then he should resign from the Sunshine Task Force. He can't have it both ways:

Mr. Pilpel made no effort to obtain an Advance Written Determination from the Ethics Commission as an exemption to his duties under provisions of the Charter or any City ordinance relating to conflicts of interest and governmental ethics involving matters *inside* the scope of his duties as a Task Force member.

It bears repeating from the initial June 22 complaint alleging Pilpel's probable violation of the SIA applicable to Task Force members, that SIA Section IV, Restrictions on Use of City Resources, City Work-product and Prestige, provides in subsection C-3, (Use of Prestige of the Office, Holding Oneself Out, Without Authorization, as a Representative of the Board, Clerk of the Board, Youth Commission or [Sunshine] Task Force):

No officer or employee may hold himself or herself out as a representative of the Board, Clerk of the Board, Youth Commission or Task Force, or as an agent acting on behalf of the Board, Clerk of the Board, Youth Commission or Task Force, unless authorized to do so.

Second Violation of SIA

On July 28, 2014, the Ethics Commission held a hearing on a Sunshine Ordinance Task Force referral for enforcement regarding Sunshine complaint #13-024, *Mica Ringel vs. Planning Department*. A key issue involved the Task Force

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having named the Director of the Planning Department, John Rahaim, in the referral for enforcement to Ethics as having been responsible for the failure to produce public records to Mr. Ringel.

Timeline of Task Force's Deliberations:

A short timeline of the complaint is in order:

- On April 26, 2013, Mica Ringel filed complaint #13-024 against the Planning Department. Although the Task Force's Administrator attempted mediation, Complainant Ringel was not satisfied with the response from the Planning Department, and requested a hearing by the Task Force.
- On October 2, 2013, the full Task Force first heard Ringel's complaint. A motion finding that the Planning Department had violated the Ordinance passed, and the case was referred to the Task Force's Compliance and Amendments Committee for follow-up. Mr. Pilpel was absent from the October 2 meeting.
- On October 23, 2013, the Task Force issued its Order of Determination finding that the Planning Department had violated the Sunshine Ordinance.
- On November 19, 2013, the Compliance and Amendments Committee passed a motion to send the case back to the full Task Force for consideration of referral to the Ethics Commission.
- On December 4, 2013, at the full Task Force a motion to refer the case to the Ethics Commission failed on a 5 to 4 vote. A second motion to refer the case to the Task Force's Education, Outreach, and Training (EOT) Committee (which Mr. Pilpel chaired) passed without objection on a 9 to 0 vote.
- At the December 9, 2013 EOT hearing, Mr. Pilpel moved to continue the matter to the EOT's January 13, 2014 meeting.
- At the January 13, 2014 EOT meeting regarding the status of the Planning Department's compliance with the Order of Determination, a motion to refer the case back to the full Task Force passed 3 to 0. The EOT Committee also requested that the Planning Department perform an additional e-mail database search using specific, detailed parameters. Notably, Mr. Pilpel voted to return the matter to jurisdiction of the full Task Force.
- On February 5, 2014, during the full Task Force's regular meeting, Mr. Pilpel moved to continue the complaint to the Task Force's February 25 meeting and to send a letter of instruction to the Planning Department asking for an additional search of records. Member Oka noted that the Task Force's October 23, 2013 Order of Determination had already constituted sufficient notification. Pilpel's motion to continue the complaint failed on a 4 to 4 vote.
- Also on February 5, 2014, a second motion was introduced to find John Rahaim, Director of the Planning Department, in violation of the Sunshine Ordinance for willful failure to comply with the Sunshine Ordinance Task Force's Order of Determination dated October 23, 2013, and to refer Sunshine complaint 13-024 to the Ethics Commission. The motion passed on a vote of 7 to 1, with the sole "Noe" vote cast by Member Pilpel (Member Todd David was absent). The full Task Force also requested that the Planning Department perform an additional search based on the direction for detailed parameters provided by Member Pilpel, Chair of EOT.

Once the full Task Force had ruled to refer the case to the Ethics Commission, Mr. Pilpel had a duty as a Sunshine Task Force member to support the majority decision passed by the full Task Force. He had his chance on February 5 to present a minority opinion to his fellow Task Force members, but he failed to convince them and they ruled against his opinion.

Undermining the Task Force's Decisions:

During public comment on the Ethics Commission's discussion of the *Mica Ringel* case on July 28, although Pilpel introduced himself as speaking as an "individual," he switched from speaking in the first person ("I") to saying twice "we," slipping into the third person as if he were speaking for the full Task Force.

The Ethics Commission had not invited Pilpel to its July 28 meeting. Pilpel's public comment involved a Task Force referral for enforcement that the Ethics Commission was discussing. Pilpel was not authorized to speak on behalf of the full Task Force to present his personal "minority opinion" on a matter falling inside the scope of his Task Force duties.

Again, Pilpel is not authorized to present his personal opinions under the guise of his SOTF membership — or as a member of the public speaking as an individual — regarding a concluded SOTF Order of Determination referring a given Sunshine complaint to Ethics for enforcement. The Statement of Incompatible Activities (SIA) for San Francisco Board of Supervisors, Clerk of the Board, Youth Commission, and Sunshine Ordinance Task Force unequivocally prohibits Pilpel from engaging in behavior that conflicts with his duties as a member of the Task Force.

Section III.A.1 of the SIA applicable to SOTF members explicitly states that:

No officer or employee may engage in an outside activity (regardless of whether the activity is compensated) that conflicts with his or her City duties.

Mr. Pilpel has a duty as a member of the Task Force to abide by and support the majority vote determinations reached by the full Task Force. The SIA does not permit him to testify to an enforcement body on a matter ***inside*** the scope of his duties by expressing his minority opinions to undercut determinations reached by the full Task Force.

Table 1: Partial Transcript of Ethics Commission Testimony, July 28, 2014

Time on Audiotape	Remarks	Commentary
1:18:46	Patrick Monette-Shaw: [As Pilpel was walking to the speaker’s microphone]: “I want to caution the Ethics Commission about this next speaker. He is not to hold himself out as [speaking for SOTF].” [Monette-Shaw ruled out of order.]	
1:18:59	“Good evening. David Pilpel speaking as an individual.”	The SIA specifically states that individuals such as Pilpel should make clear that they are speaking in their “private capacity and not as a representative of the Board, Clerk of the Board, Youth Commission or Task Force.” Mr. Pilpel did not clearly state that he was not speaking as a representative of the Task Force; he only stated the first half of the “and” clause, and omitted the second half of the clause following the word “and.”
1:19:10	Pilpel: “Upon reviewing the [Ethics Commission’s] staff recommendation [regarding Sunshine Complaint 13-024, <i>Mica Ringel vs. Planning Department</i> referred to Ethics by the full SOTF], I’m inclined to agree [with the Ethics Commission staff report] that Mr. Rahaim did not commit a violation [of the Sunshine Ordinance] — willful or non-willful — of the Ordinance. I generally agree that the [Planning] Department was delayed in their production of records.	
	There’s clearly some problems that I see with this, and I see that you have discussed a lot of them already.	
	[Interruption by Monette-Shaw and warning by Acting Ethics Chair Paul Renne.]	
1:20:00	Pilpel: “I’ll repeat that I am speaking as an individual. I am not representing the Task Force at this time. Thank you.	
	The [Task Force’s 10/23/13] Order of Determination which I just reviewed found that the Department had committed a violation. I’m not sure if that’s the best way to proceed. I’m not sure that Departments — in that way — violate the Ordinance. I think that it is individuals who	Here Pilpel questions and undermines the decisions of the Task Force’s Order of Determination.

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Time on Audiotape	Remarks	Commentary
	<p>either produce records or don't. I'm not sure how <u>we</u> fix that, or how that can be fixed at this point.</p> <p>This really does resemble, in my mind, the <i>Mionici vs. Rec Park</i> hearing that was heard a few months ago [referring to the April 28 meeting of the Ethics Commission at which Pilpel introduced himself as a member of the SOTF, in violation of the <i>Statement of Incompatible Activities</i> applicable to members of the SOTF].</p> <p>You could certainly find a violation. Maybe that sends a message, but I'm not sure if the point here is to send a message, or [if] it's to achieve compliance. And I'm not sure if other than the person to whom a records request is directed, if someone else is held responsible for their conduct, if that actually sends the right message in terms of compliance.</p>	<p>Although Pilpel claimed to be speaking as an individual, within the first minute-and-a-half of his testimony he switched from using the first person "I" into using the third person "we," again appearing to be speaking on behalf of the SOTF.</p> <p>Here, Pilpel is clearly undermining the conclusion of the full Sunshine Task Force that had named Planning Department director John Rahaim as responsible for the failure of his staff to produce records. Pilpel's testimony at this point sought to directly interfere with the Task Force's referral to the Ethics Commission without authorization from the Task Force to do so, sabotaging the Task Force's decision to refer the matter to Ethics.</p>
	<p>There are really some issues to struggle with here. I want to address briefly Commissioner Hayon's question about training [of City employees]. The Committee that I Chair at the Task Force — "Education, Outreach, and Training" — has held a number of hearings about Departments, and their policies and procedures regarding records requests.</p>	<p>Here, Pilpel appears to be using the prestige of his office as Chair of EOT in his response to Ethics Commissioner Hayon to imply that EOT has already struggled with the training issues regarding policies and procedures responding to records requests. This crosses the line of speaking as an individual (a dispassionate member of the public) and borders on holding himself out as speaking in his official capacity as Chair of an SOTF subcommittee.</p>
	<p>I was intending to invite Mr. Ionin to come [to the Task Force's EOT subcommittee] and to talk about the Planning Department and their policies and procedures. We generally don't do specific training, but what <u>we</u> have here ..."</p>	<p>At the point Pilpel used the third-[person "we" for a second time as if he were speaking for the Task Force, Patrick Monette-Shaw interjected from the audience, saying "We? Really?"</p>
<p>1:21:47</p>	<p>Pilpel: "If you have questions, I can answer on that.</p>	
	<p>The one thing I didn't see in the file was the actual referral letter from the Task Force. There are all kinds of other documents from the Task Force that were helpful in recollection, but I didn't see the actual referral letter.</p>	
<p>1:22:16</p>	<p>In summary, you could find a violation if you believe that the facts and the law support that. I think that there are still issues about who is named and whether it's the individual who receives a records request, their supervisor, or the department head. And there may be some distinctions with a small department, or a medium or large department. I think it would be difficult to believe that a department head in a large- or medium-sized department is involved in all records requests. If you have any questions, I can answer them. Otherwise, thank you."</p>	<p>Pilpel again questioned the wisdom of the Task Force's majority decision that Planning Director Rahaim be named as responsible, holding out his minority opinion on a matter that clearly falls <i>inside</i> the scope of his duties as a Task Force member.</p>

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Conclusion

Although Mr. Pilpel claimed to be speaking on July 28 as an “individual,” rather than introducing himself as a member of the Sunshine Task Force, it was a thinly-veiled disguise, since he was clearly speaking on a matter that fell *inside* the scope of his duties as a Task Force member that is prohibited by the governing SIA.

While the governing SIA may permit Mr. Pilpel to testify before other policy bodies, and boards and commissions, on any issues *outside* the scope of his duties as a member of the Sunshine Task Force, when he voluntarily became a member of the Task Force he became bound by the SIA that restricts his testimony regarding issues *inside* the scope of his duties as a member of the Sunshine Task Force.

As such, Mr. Pilpel appears to have violated the governing SIA a second time.

[signed]

Patrick Monette-Shaw

Columnist/Reporter

Westside Observer Newspaper

cc: Ethics Commission President Ben Hur and Ethics Commission Members
Sunshine Ordinance Task Force Members
Board of Supervisors Rules Committee Members