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Ask Supervisor Scott "The Tinkerer" Wiener:

Who Killed Sunshine?

by Patrick Monette-Shaw

Mr. Wiener's Many Faces: May 22 Board of Supervisors meeting; available on-line on SFGOV TV, at http://www.sfgovtv.org.

Has Supervisor Scott "The Tinkerer" Wiener single-handedly killed open government "Sunshine" in San Francisco, however temporarily? Sunshine has left the City, leaving the Sunshine Task Force in official limbo.

Clearly peeved, Wiener kicked physically disabled member Bruce Wolfe off of the Sunshine Ordinance Task Force on May 22, filling the remaining "member of the public" seats with non-disabled appointees. Wolfe was the only physically handicapped member of the Task Force, which now can't convene while lacking a physically disabled member.

Sunshine Ordinance Section 67.30(a) has long required[1] that "At all times, the Task Force shall include at least one member who shall be a member of the public who is physically handicapped and who has demonstrated interest in citizen access and participation in local government," a requirement lawyer Wiener either didn't know about, or studiously ignored. [**Note:** "Handicapped" refers to a person having a physical disability.]

> **"What was Vice Chair Wolfe's 'crime' that warranted being removed from the Task Force? Wiener claims Wolfe had 'been part of the Task Force when all of these things have happened'."**

What was Vice Chair Wolfe's "crime" that warranted being removed from the Task Force? Wiener claims Wolfe had "been part of the Task Force when all of these things have happened," ostensibly including when it found Wiener guilty of official misconduct on September 27, 2011.

Wolfe may have earned Wiener's enmity a second time a month later on October 24, 2011, when Wolfe publicly opposed Wiener's Prop. E and Prop. F November 2011 ballot measures during the West of Twin Peaks Central Council endorsement session. Wiener left that meeting in speechless shock after retired Judge Quentin Kopp questioned Wiener about why we even need an Ethics Commission.

> **"Wolfe may have continued earning Wiener's enmity a month later, when Wolfe publicly opposed Wiener's November 2011 Prop. E and Prop. F ballot measures."**

Removing Wolfe smacks of political payback. Wiener presented no specific charges against Wolfe, just that Wolfe had "been around." Wiener was referring to things he classified as "bad," but were clearly within the Task Force's legitimate purview.

[1] During the Sunshine Ordinance Task Force meeting June 6, 2012, newly-appointed member David Pilpel repeatedly questioned the Task Force's advising Deputy City Attorney, Jerry Threet, about whether the seat reserved for a disabled member was inclusive of all Task Force seats, or exclusive to the community organization nominees. Threet remained silent on the issue, but the Sunshine Ordinance is clear that it specifies the member with a physical disability must be a "member of the public," not from other reserved seats.

Wiener went so far as to state conclusively during the May 22, 2012 Board of Supervisors meeting broadcast on cable (SFGOV TV) that the Sunshine Ordinance Task Force ***had engaged in official misconduct***. He didn't qualify his accusation with "allegedly," or "potentially," or "perhaps" had engaged in misconduct.

Wiener went further May 22, claiming not only that the Task Force had engaged in official misconduct, but also that "the current Sunshine Ordinance Task Force … frankly, has undermined both the Ordinance and transparency in government … in several ways."

To support this claim, Wiener lied at least four times. One tiny problem: None of what Wiener claimed had happened; none of it was true.

What had been the Task Force's crime? As the first of his lies, Wiener whined "This Task Force purported to exempt itself from the San Francisco Charter."

The Task Force did **not** exempt itself from the City Charter. Instead, the Task Force had amended its bylaws in April 2011, a lawful act. Because of ambiguities in Charter Section 4.104 — a section not clear that it even applies to the Task Force — the Task Force disagreed with an opinion from City Attorney Dennis Herrera regarding how many members need to be present during meetings to pass motions.

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Indeed, before voting to change its bylaws, the Task Force recognized that the types of entities listed in Charter Section 4.104 excluded task forces; referred ***only*** to entities of the Executive Branch, since the Sunshine Task Force is an entity of the Legislative Branch; and that this section of the Charter specifies ***only*** entities created by Legislative acts, not to entities created by the electorate (i.e., members of the public otherwise known as "voters").

When the Task Force adopted its rule, changing to a majority of members present rather than a majority of all members, those who voted for the bylaw change did so believing that they were ***not*** flouting the Charter or any other law, they just didn't agree with Herrera's interpretation, since City Attorney "interpretations" and "opinions" don't carry force of law.

Wiener Slanders the Task Force

Wiener stated, as if he were both the judge and jury, "And frankly, that was official misconduct, in my personal view."

He didn't afford the Task Force an opportunity to respond or defend itself; he just falsely accused the Task Force and concluded with no debate or evidence, and without a hearing presenting any charges, slandering the Task Force in the process. After the Task Force lawfully amended its bylaws, why did Wiener wait for a whole year before making this an issue?

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Was it retribution for the Task Force having found Wiener guilty official misconduct six months ***after*** it had adopted its bylaws change?

Perhaps Wiener is taking cues for slander from Mayor Ed Lee, who appears to have slandered Sheriff Ross Mirkarimi by claiming, as the mayor did on June 20, that Mirkarimi had "engaged in beating his wife," appalling many observers by not qualifying it with "***allegedly***." Lee reached this conclusion before the Ethics Commission or the Board of Supervisors completed their investigations of the wildly

inflated charges against the Sheriff. Both Lee and Wiener are throwing false accusations against the wall, hoping to see which libelous accusations may stick.

Ironically, although Wiener stated on May 22 that "The Sunshine Ordinance, and transparency in government in general, is incredibly important," he's sponsored measures to lessen campaign finance disclosure transparency, and the Task Force found that Wiener violated the Sunshine Ordinance himself, as this article explores.

Second, Wiener lied claiming that he had asked the Board's Budget and Legislative Analyst, Harvey Rose, for an "audit," inferring an audit of the Task Force. In truth, Wiener had requested a ***survey*** of each City department's costs to comply with the Sunshine Ordinance, not an "audit" of the Sunshine Task Force's revenue and expenses.

Third, Wiener claimed on SFGOV TV that the Task Force had responded by saying, "How dare you! How dare you shine sunlight on us?" No Task Force member had ever said any such thing, even remotely; Wiener clearly lied on broadcast TV during a Board hearing.

In truth, the Task Force's only response was a March 22, 2012 letter to Wiener, respectfully noting he had ***not*** extended the courtesy of informing the Task Force of his intent to conduct such a survey, and asking for clarification about his motivation for requesting the survey. The Task Force asked what benefit Wiener expected the public to receive from such a survey, since he had not asked Rose to estimate or quantify the benefits of Sunshine, just expenses. Wiener failed to ask that costs of compliance with the California Public Records Act be reported separately, which turns out to be the major "driver" in costs of compliance with local and state open government laws.

The Task Force was within its rights when it appropriately requested an explanation from Wiener, and it extended an open invitation to him to discuss any issues regarding the Sunshine Ordinance and the Task Force's procedures. It never once said "How dare you!," as Wiener falsely claimed.

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Fourth, Wiener claimed on May 22, "On average, City employees had to spend 1.9 Task Force hearings to get complaints against them adjudicated. … They couldn't go the first time and get it done," which Wiener then found to be unacceptable because "It creates enormous inefficiencies."

Here, Wiener was relying on Rose's flawed analysis. Rose had included 21 Sunshine complaints filed in 2010 in his estimate of the costs of Sunshine that was to have focused on 2011. As well, Rose had excluded 31 of the 86 Sunshine complaints filed in 2011 — a full 36% — that may either never had a Sunshine hearing (perhaps dismissed or resolved before requiring a hearing) or were not heard until 2012. Of the remaining 55 complaints filed in 2011, six — or 11% — were resolved in just one hearing.

If 31 complaints never received any hearing, the claim of 1.9 average hearings begins to fall apart.

So in potentially 47% of the Sunshine complaints filed in 2011, the Task Force did a commendable job resolving those cases with one hearing per case or less, which Rose clearly overlooked. But Wiener blames the Task Force for multiple hearings, when indeed many of the cases that required multiple hearings were because respondent departments failed to show up at the first hearing — something obviously beyond control of the Sunshine Task Force — which Rose never quantified and which Wiener ignores.

In order to be more efficient, the Task Force changed its procedures, eliminating the requirement that all complaints be heard first by its Complaint Committee, requiring a second hearing only in cases where the Task Force's jurisdiction was questioned. It's also unclear whether Rose counted as "multiple hearings" the vast majority of cases where a five-minute agenda item to determine jurisdiction at a full Task Force meeting preceding a second agenda item to hear the particular complaint was double-counted as two "hearings," when in

fact it may have involved a single meeting with a two-part agenda item, perhaps inflating Wiener's claim that City employees couldn't just go once to get cases against them heard.

A Harvard Law School graduate, Wiener is known as a hard worker, but he's not faced much adversity in terms of advancing his political career. Wiener worked five years as an attorney at Heller Ehrman White & McAuliffe, where he focused on financial, accounting-related, and commercial litigation. In 2002, he took a position with the San Francisco City Attorney's Trial Team representing City departments in civil litigation. In both positions Wiener was thought to have a lily-white reputation.

Perhaps while a Deputy City Attorney, Wiener may have ran across the Sunshine Ordinance as a result of knowledgeable litigants who had used the City's open government Sunshine law during legal discovery. Then he ran for District 8 Supervisor, and his reputation began getting black marks.

Luckily for San Franciscans, Wiener has faced a number of setbacks to his various schemes tinkering with lessening transparency at City Hall. Here's the timeline that reduced Wiener to vindictiveness:

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Wiener's Tinkering Timeline

- On September 27, 2011 the Sunshine Task Force heard a complaint from Parkmerced resident Pastor Lynn Gavin that Board of Supervisors President David Chiu and the board's Land Use and Economic Development Committee — composed by Supervisors Eric Mar, Malia Cohen, and Scott Wiener — had violated local and state open-meeting laws by sneaking in 14 pages of amendments to the Parkmerced development deal only minutes before approving it. Pastor Gavin asserted the amendments were so drastic that the Board's agenda didn't accurately reflect the real deal under consideration, and that voting to approve it without sufficient time for review by members of the public violated open-meeting laws. The Sunshine Task Force ruled in Gavin's favor, finding Wiener and the other three supervisors had committed official misconduct, and referred the four Supervisors to the Ethics Commission for enforcement.

- On November 8, 2011, San Francisco voters rejected Proposition "E" that Wiener had sponsored. Initially, Wiener had proposed granting the Mayor and Board of Supervisors authority to amend or repeal measures placed on the ballot by the Mayor, four or more Supervisors, or by citizens signature petition initiatives. Facing intense public criticism in the spring of 2011, Wiener toned the measure down and eventually convinced only seven of the Supervisors on July 19 to place a modified version on the ballot, to allow amendments to, or repeal of, measures that only the Board or Mayor had placed on the ballot, but not to citizen measures, or Charter amendments and bond measures. Opposed by the Friends of Ethics — founded by five former Ethics Commission members — Prop. "E" went down to defeat on November 8, handing Wiener a second public embarrassment.

- Another Wiener-sponsored ballot measure also went down in flames on November 8, handing him a third embarrassment. Prop "F" would have: Redefined who would be required to register as campaign consultants; raised the threshold of campaign consultant earnings from $1,000 to $5,000; eliminated filing of paper reports, requiring only electronic reports instead; amended the annual fees to no longer depend on the number of clients campaign consultants represent; and would have allowed the City to change campaign consultant ordinance provisions without further voter approval. Voters saw right through this, defeating Prop "F" and slapping Wiener with a third embarrassing defeat.

- Humiliated three times in as many months, Wiener next asked Budget and Legislative Analyst Harvey Rose on December 13, 2011 to conduct a one-sided "*Survey of Costs of Compliance with the City Sunshine Ordinance*." Wiener told neither his Board colleagues nor members of the Sunshine Task Force that he had placed this furtive request to Rose, as if Wiener had never heard the words "transparency in government" before in his life. Wiener was reportedly concerned about the costs of overtime for City employees to attend Task Force hearings.

  Of the 41 City departments that responded to Rose's "*Costs of Sunshine*" survey instrument, just three departments — the Ethics Commission, the Planning Department, and Muni — reported overtime costs. City Departments claimed 14,000 hours of effort theoretically complying with Sunshine (over three-quarters of which would have been required by the California Public Records Act anyway), and reported just 77 hours of overtime. The overtime was estimated at just $5,678 out of approximately $2.5 million in salaries and fringe benefit costs. Notably, the Sunshine Task Force's two paid employees — its then-administrator Chris Rustom, and Deputy City Attorney Jerry Threet — earned no overtime in 2011 according to the City Controller's payroll records. Wiener shouldn't have been in a tizzy over less than $6,000 in overtime.

- On April 8, 2012, Harvey Rose released his analysis that Wiener had asked Rose to prepare. However inadvertently, Rose slapped Wiener with a fourth public embarrassment: That fully 77% of the costs identified to comply with open government regulations "would continue to exist under current State law [the California Public Records Act and the Brown Act] even if the City did not have the Sunshine Ordinance." Rose noted that the net costs attributable solely to the Sunshine Ordinance were just $997,676, representing less than ***two-hundredths of one percent*** of the City's then $6.8 billion annual budget. Wiener could not have been happy learning that the costs to comply with Sunshine is less than a million dollars, costing just $1.24 annually for each of the City's 805,000 residents.

  Rose, however, did not calculate any savings or benefits the Sunshine Ordinance may have brought to taxpayers, including costs avoided involving court cases concerning access to public records. As this reporter has previously noted, $350,000 was restored to the Laguna Honda Hospital patient gift fund as a result of public records requests filed by Drs. Kerr and Rivero, and the City is now pursuing in Superior Court $70 million in Laguna Honda Hospital replacement project "change orders," which change-order cost overruns were also uncovered through public records Sunshine requests.

Sunshine Blackout

Given these embarrassments, Wiener apparently engineered on May 22 stripping Bruce Wolfe of his seat on the Task Force. Wiener also supported the Rules Committee recommendation to hold up approving four nominations for appointment to the Task Force by demanding that three nominating agencies — the Society of Professional Journalists, the League of Women Voters of San Francisco, and New America Media — submit multiple nominees from each agency, rather than single nominees (as they have since Sunshine became law) be forwarded to the Board of Supervisors Rules Committee for appointment. Those four appointments to the Task Force also remain in limbo.

> **"Following advice from its advising Deputy City Attorney, the Sunshine Task Force voted to adjourn its regularly scheduled meetings until such time as a physically handicapped member is re-appointed to the Task Force, as the Sunshine Ordinance requires. … Supervisor David Campos noted the embarrassment the City will suffer."**

On June 6, following advice from its advising Deputy City Attorney, the Sunshine Task Force voted to adjourn its regularly scheduled meetings until such time as a physically handicapped member is re-appointed to the Task Force, as the Sunshine Ordinance requires; without a disabled member, Task Force votes on its action items could be legally challenged. Supervisor David Campos noted during the June 6 meeting — speaking as a member of the public, not in his role as a City supervisor — the embarrassment the City will suffer from shutting down its Sunshine oversight body due to failure to comply with disability rights provisions in the Sunshine Ordinance.

A day later, on June 7, Wiener was slapped again, this time by his Board "colleagues" on the Rules Committee. Again carrying water for the Ethics Commission — despite the resounding rejection of Props. "E" and "F" by voters last November — Wiener introduced an Ordinance that would have, among other things, "modified and streamlined reporting requirements for candidates and third parties spending funds in local elections," and to "eliminate the overall contribution limit on contributions to all candidates on the ballot in a single election."

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Wiener's proposed ordinance would have, according to some observers, strengthened application of the U.S. Supreme Court case ***Citizen's United*** in San Francisco by undoing contribution caps. After hearing from a number of former Ethics Commissioners who spoke during public comment on June 7, and after hearing Supervisor Campos' many concerns, the Rules Committee didn't forward Wiener's latest ordinance to the full Board of Supervisors for adoption; it sent the legislation back to the Ethics Commission for further work. Poor Wiener just can't get anything right.

Here it is a month later, and Wiener-"The-Tinkerer" remains unrepentant. He single-handedly shut down Sunshine in San Francisco, and he's in no hurry to let the Sunshine back in. For all anyone knows, Wiener may be counting on keeping the Sunshine Task Force deadlocked and shut down for as long as possible.

The longer the Sunshine Task Force is in limbo, the more likely it will be for City Hall to engage in backroom deals without sufficient public oversight. Call the Mayor's Office on Disability at 554-6789 and ask them for its support in getting Bruce Wolfe reinstated so the Sunshine Task Force can resume its operations.

Monette-Shaw is an open-government accountability advocate, a patient advocate, and a member of California's First Amendment Coalition. He received the Society of Professional Journalists–Northern California Chapter's **James Madison Freedom of Information Award** *in the* **Advocacy** *category in March 2012.* ***Feedback****: mailto:monette-shaw@westsideobserver.*