

SUNSHINE ORDINANCE TASK FORCE

Room 244

1 Dr. Carlton B. Goodlett Place

San Francisco CA 94102

sotf@sfgov.org

sent via email to Task Force

Your ref.
#19089

Date
2019-09-17

RE: SF Sunshine Ordinance complaint against City Atty, ref SOTF 19089

To Whom It May Concern:

NOTE: Every response you send or provide (including all responsive records) may be automatically and immediately visible to the general public on the MuckRock.com web service used to issue this request. (I am not a representative of MuckRock)

I have attached my analysis of the 2015, 2016, 2017, and 2018 Supervisor of Records' annual reports summaries in Attachment 1. Out of 51 petitions received in those 4 years:

- Respondent **provided a determination in 15 of the 51 cases (29%)**, in all cases denying the petition and ruling the public agency was in fact correct.
- Out of these 15 determinations, **the 10-day deadline was met in only 2 (13% of 15)** of the cases. When the 10-day deadline was not met, the **response was after 33.5 days on average**, with a minimum of 11 and maximum of 70. The response at issue in this case 19089 was after 103 days.
- Respondent appears to have **never granted a petition in 4 years.**
- Respondent **provided "no determination" in 35 cases**, because it deemed for various reasons none was "needed," and stated the petition was outside of its scope in 1 case. Out of these 35 cases, many involved the agency disclosing the records eventually (perhaps, but unknown due to a claimed privilege shield, due to intra-city convincing by the Supervisor). However, the Supervisor should still have provided the written determination that was petitioned for, as there is no mootness rule in SFAC 67.21. One might suspect these determinations would be favorable to the petitioner, but sadly are not in the record because the Supervisor believes it is not necessary.

The evidence suggests the failure to meet the 10-day requirement (or even not provide a determination at all) is not unique to my case 19089, and is in fact a regular occurrence.¹ It suggests the non-compliance with a 10-day deadline is in fact not only for complex cases but for other reasons – perhaps a lack of resources, budgeting, or prioritization of the important functions of the Supervisor of Records, an avoidance of requiring itself and its peer city agencies to exactly follow the voters' will in enacting the Ordinance, or some other reason.

¹On Sept. 5, Respondents claimed "However, this Office – which the Sunshine Ordinance entrusts with the Supervisor of Records function – has never viewed the 10 days as an absolute deadline. In some situations, a request may be unusually complex, in terms of legal issues or factual issues or both, or may require the requester or the responding department to follow up in order to make the issue or issues ripe for determination."

Finally, the DCA memo in this case suggests a possible “rule of reason” excuse for noncompliance. The Respondent (Supervisor of Records, in another case), claims that the “rule of reason” may allow it to delay a determination under SFAC 67.21(d) beyond 10 days, due to the complexity and number of my petitions. See their letter in Attachment 2, and my reply in Attachment 3 in which I explain why the rule of reason does not apply to determinations of record exemption, even if it may apply to the *production* of voluminous records.

Sincerely,

Anonymous

Petition	Determination	"Petition closed"	Determination Days	Closure Days	Status	Reasons	Sources
2015-Feb-27		2015-Apr-08	40	"No determination needed"	Records provided	[4]	
2015-Mar-17	2015-May-26		70	Denied	GC 6254(k), 53087.6(e)(2), SF Charter 4.123	[4]	
2015-Apr-01		2015-Apr-17	16	"No determination needed"	Records provided	[4]	
2015-Apr-07		2015-Apr-13	6	"No determination needed"	No responsive records	[4]	
2015-May-28	2015-Jun-17		20	Denied	GC 6254(a), SFAC 67.24	[4]	
2015-May-29		2015-May-29	0	"No determination needed"	Outside of scope	[4]	
2015-Jun-22	2015-Jun-30		8	Denied	GC 6254(k), EC 1041, 1040	[4]	
2015-Jul-10		2015-Jul-14	4	"No determination needed"	No responsive records	[4]	
2015-Jul-21		2015-Jul-21	0	"No determination needed"	Outside of scope	[4]	
2015-Nov-19	2015-Dec-07		18	Denied	GC 6254(c,f,k)	[4]	
2015-Dec-30	2016-Jan-29		30	Denied	GC 6254(f,k)	[4]	
2016-Jan-12		2016-Jan-26	14	"No determination needed"	Dept. produced responsive records	[3]	
2016-Jan-20		2016-Feb-02	13	"No determination needed"	Dept. agreed to produce records	[3]	
2016-Feb-05		2016-Feb-18	13	"No determination needed"	Dept. agreed to provide "summary"	[3]	
2016-Feb-08	2016-Mar-07		28	Denied	GC 6254(c,k), EC 954, dept. produced other records	[3]	
2016-Feb-16	2016-Mar-07		20	Denied	GC 6254(c,k), EC 954, 1041, dept. produced other or had no records	[3]	
2016-Feb-19		2016-Mar-10	20	"No determination needed"	Department "addressed petitioner's concern"	[3]	
2016-Mar-17		2016-Mar-18	1	"No determination needed"	Dept. produced the report	[3]	
2016-Mar-22		2016-Mar-23	1	"Outside the scope of review"	Timeliness outside scope of review	[3]	
2016-May-12		2016-Jun-30	49	"No determination needed"	Dept. produced responsive records	[3]	
2016-May-23		2016-Aug-10	79	"No determination needed"	Dept. produced or had no records	[3]	
2016-Jun-01		2016-Jun-02	1	"No determination needed"	Dept posted the report	[3]	
2016-Jun-06		2016-Jun-30	24	"No determination needed"	Dept. produced responsive records	[3]	
2016-Jul-07	2016-Jul-12		5	Denied	No actual request submitted to dept.	[3]	
2016-Aug-12		2016-Aug-19	7	"No determination needed"	Dept. produced or had no records	[3]	
2016-Sep-06		2016-Sep-09	3	"No determination needed"	No responsive records	[3]	
2016-Sep-07	2016-Oct-31		54	Denied	6254(c); Constitutional privacy; indiscriminate	[3]	
2016-Sep-08		2016-Sep-21	13	"No determination needed"	Dept. agreed to produce records	[3]	
2016-Nov-21		2016-Nov-30	9	"No determination needed"	Dept. agreed to produce records	[3]	
2017-Jan-13	2017-Feb-22		40	Denied	Privacy	[1]	
2017-Jan-30	2017-Feb-17		18	Denied	GC 6254(f); SFAC 67.24(d)	[1]	
2017-Jan-31		2017-Feb-01	1	"No determination needed"	Dept. produced responsive records	[1]	
2017-Apr-27		2017-May-10	13	"No determination needed"	No responsive records	[1]	
2017-Jun-12		2017-Jun-20	8	"No determination needed"	Dept. produced responsive records	[1]	
2017-Jun-20		2017-Jun-27	7	"No determination needed"	Dept. produced responsive records	[1]	
2017-Jun-24		2017-Jun-26	2	"No determination needed"	Dept. produced responsive records	[1]	
2017-Jun-29		2017-Jul-06	7	"No determination needed"	No jurisdiction	[1]	
2017-Jul-24		2017-Aug-07	14	"No determination needed"	No jurisdiction	[1]	
2017-Aug-17		2017-Sep-22	36	"No determination needed"	Dept. produced responsive records	[1]	
2017-Nov-10		2017-Nov-13	3	"No determination needed"	No responsive records	[1]	
2017-Nov-17		2017-Nov-17	0	"No determination needed"	No responsive records	[1]	
2017-Dec-05		2017-Dec-07	2	"No determination needed"	No responsive records; No jurisdiction	[1]	
2017-Dec-19		2018-Jan-10	22	"No determination needed"	No responsive records; No jurisdiction	[1]	
2018-Apr-06		2018-Apr-17	11	"No determination needed"	Dept. produced responsive records	[2]	
2018-Apr-17	2018-Jun-12		56	Denied	No responsive records; Dept. produced records; SFAC 67.24(e)(1), etc.	[2]	
2018-Jun-01		2018-Jun-05	4	"No determination needed"	Did not withhold or redact records.	[2]	
2018-Aug-20		2018-Aug-22	2	"No determination needed"	No responsive records	[2]	
2018-Aug-24	2018-Sep-14		21	Denied	No jurisdiction; outside of scope	[2]	
2018-Sep-06		2018-Oct-01	25	"No determination needed"	Dept. produced responsive records	[2]	
2018-Nov-02	2018-Dec-03		31	Denied	GC 6254(f)(1), 6254(k)	[2]	
2018-Dec-10	2018-Dec-21		11	Denied	SFAC 67.29-5	[2]	

Sources

- [1] - <https://www.sfcityattorney.org/wp-content/uploads/2015/08/18th-Annual-SOR-Report-FINAL.pdf>
[2] - <https://www.sfcityattorney.org/wp-content/uploads/2019/01/19th-Annual-Report-of-SOR-final.pdf>
[3] - <https://www.sfcityattorney.org/wp-content/uploads/2015/08/17thAnnualReport.pdf>
[4] - <https://www.sfcityattorney.org/wp-content/uploads/2015/08/Sixteenth-Annual-Report-of-the-Supervisor-of-Records.pdf>

ATTACHMENT 2

Subject: RE: California Public Records Act Request: More Calendars - Immediate Disclosure Request

Email

To Whom it May Concern:

We write to provide an update on the status of our consideration of your petitions. Since September 6, you have submitted five separate petitions to the Supervisor of Records and numerous other email communications concerning prior petitions. We have already responded to four other petitions you submitted in recent months.

Due to the volume of petitions and the complexity of the issues raised, we are invoking the rule of reason and will respond to your petitions within a reasonable time period with the goal of addressing each petition within 30 days of submission. As we recently explained in response to one of your complaints with the Sunshine Ordinance Task Force, we strive to respond to petitions within the 10-day period specified in Section 67.21(d), but we don't view it as an absolute deadline. Particularly here, where the issues raised are novel and you have submitted numerous petitions over a short time period, responding within 10 days is not feasible because doing so would unreasonably impinge on our ability to perform our other responsibilities.

Please let us know if you have a preference in terms of which petition to prioritize. Otherwise, we will likely consider them in the order received. Thank you.

Bradley Russi
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Supervisor of Records
City Hall, Rooms 234
1 Dr. Carlton B. Goodlett Pl.
San Francisco CA 94102
supervisor.records@sfcityatty.org
sent via email

Our ref.
#79117-REP

Date
2019-09-16

RE: Various SF Sunshine Ordinance petitions – #79117-REP

To the Supervisor of Records:

NOTE: Every response you send or provide (including all responsive records) may be automatically and immediately visible to the general public on the MuckRock.com web service used to issue this request. (I am not a representative of MuckRock)

This is a response to your letter of Sept. 16 in which you purport to invoke the so-called “rule of reason” to avoid responding to Supervisor of Records petitions within the 10-day timeline contemplated by SF Admin Code (SFAC) 67.21(d).

Petitions

I have attached in Exhibit A a list of certain of the petitions I have made¹ and their general topics for your convenience. While I do not concede, and dispute below, that it is proper for your office to delay my petitions based on the number you believe I have anonymously made or their complexity, my prioritized order by the exhibit row number is: email/text [19, 13, and 12], calendars [14, 6, and 5 (where no clear determination was apparent)], and non-profits [27]. Your analysis for one petition in each group should probably inform the others and reduce overall response time. Furthermore, I explicitly stated in some petitions that while you may need more time for the complex parts of my petitions (listings of various headers), the other parts still need timely responses.

I am not clear what determination was issued in your prior row 5 response, as there was neither a grant nor a denial explicitly stated.

The more important issue however is that it does not appear the Supervisor of Records has performed a complete analysis on my prior petitions that it has responded to. It is your office’s responsibility to determine if “any part” of a record is public. When my first petitions regarding

¹While I am happy to indicate that the specific petitions in Exhibit A have all been made by me, I have no obligation to state that multiple anonymous petitions do in fact belong to me, nor can I be required in any way to indicate that any other possible past or future petitions were or will be made by me as well. No provision of the SFAC 67.21 petition process requires providing my name or other identity, and records requestors and petitioners may have many reasons to remain completely anonymous, both within and across petitions and requests, including to prevent government retaliation against the exercise of their federal First Amendment or state Art. 1, Sec. 3 constitutional rights.

emails and calendars were initially made, even though your office claimed² that those petitions took an extraordinary amount of time (approx. 3 months each) due to research with its IT staff, it denied the petitions in whole, without even considering in your response the different kinds of metadata withheld, and even though there is some extremely basic metadata (like city employee email addresses in To/From/etc. fields) that are obviously public parts of records. In addition, the issue that non-Prop G calendars should be turned over was not even considered until I made a second petition for them.

Because your office does not appear to have considered these parts of records in my initial petitions, I am forced to write some of my currently pending petitions in a very verbose and, in your estimation, complex way. The Sunshine Ordinance forces the government to account for its claimed exemptions more specifically than the CPRA. Unlike the arguments of some under the CPRA, under the Sunshine Ordinance, even documents that are mostly redacted must still be turned over with whatever small amounts of non-exempt information they contain, and the Supervisor of Records needs to more thoroughly do its duty to identify those parts.

When you do provide your determination, please be clear whether you are granting my petition in any part (i.e. you have determined that any part of the record requested is public). There is no mootness provision in SFAC 67.21 for these determinations, even if an order is no longer needed, and moreover your written determinations of the public parts of records obviates the need for me to continue to file these petitions against each agency and each record request separately.³

Rule of reason

The rule of reason is primarily defined judicially⁴ by the Cal. Supreme Court in *Bruce v. Gregory* (1967) 65 Cal. 2d:

We therefore hold that the rights created by section 1892 of the Code of Civil Procedure and section 1227 of the Government Code, are, by their very nature, not absolute, but are subject to an implied rule of reason. Furthermore, this inherent reasonableness limitation should enable the custodian of public records to formulate regulations necessary to protect the safety of the records against theft, mutilation or accidental damage, to prevent inspection from interfering with the orderly function of his office and its employees, and generally to avoid chaos in the record archives.

and extended to what is now the CPRA in *Rosenthal v. Hansen* (1973) 34 Cal. App. 3d. Note that this rule applies to voluminous *productions*, not the *determinations* that agencies must provide within defined timelines in the CPRA. In that same vein, it would not apply to the Supervisor of Records' determinations under SFAC 67.21(d).

Petitions (or the act of responding to them) for a determination that records are public do not cause theft, mutilation or accidental damage, nor do they create chaos in record archives. The office of

² John Coté, September 5, 2019, Response to SOTF 19089.

³ Note however when you *deny* a petition, that is not the final say on the matter. SFAC 67.21(e) explicitly contemplates that the Task Force can determine a record public even if your office refuses to respond or denies the petition. And courts can make records public regardless.

⁴ Attorney General's opinions on the CPRA are not legal precedent nor binding.

Supervisor of Records exists entirely to make these determinations, and therefore they could not interfere with the orderly functioning of the office, since it *is* the function. The Supervisor of Records need not produce or search for voluminous records itself, but instead needs to perform a legal and factual analysis – which is of course one of the primary job functions of attorneys.

The CPRA provides that local ordinances may provide “for faster, more efficient, or greater access to records” than the CPRA, and the Sunshine Ordinance is precisely such an ordinance, for example by requiring legal citations for all exemptions, imposing immediate disclosure timelines, requiring agencies to use any requested electronic format that is easily generated, explicitly prohibiting charging fees for the redaction of records, prohibiting the public interest balancing test exemption and all exemptions similar to it, and of course creating the Supervisor of Records and Sunshine Task Force, the latter of which can overrule a determination of exemption by the former.

There is nothing in the Sunshine Ordinance that would indicate that the word “shall” in SFAC 67.21(d) is non-mandatory or discretionary; in fact, interpreting it as such would gut the Ordinance as a whole. It is the same word used to create obligations of the various agencies. The key judicial interpretations of the CPRA as subject to a rule of reason are decades before the Sunshine Ordinance even came into being between 1993 and 1999. And because the office of Supervisor of Records and its duties are created solely by the Ordinance and do not exist in the CPRA, and because the Supervisor of Records does not itself search for or produce records, it is not certain whether the rule of reason even applies to the Supervisor of Records role. I do not believe there is any precedent that it does.

The Supervisor of Records role is not a tertiary responsibility of the City Attorney. The City Attorney is tasked with “protect[ing] and secur[ing] the rights of the people of San Francisco to access public information and public meetings” and a timely response to petitions is a key part of that important responsibility. Until your office responds, of course, a requestor cannot enforce any favorable determination you provide at Superior Court under SFAC 67.21(f), and therefore undue delay interferes with the public’s right of access.

Sincerely,

Anonymous

2019 Public Records Audit - San Francisco		Appeals:										1. SF Sunshine Ordinance Task Force				2. CA Superior Court	
Respondent Row Agency	Internal Req. #	Public Records Demanded / Issue / Petition	Status	Petition Sent	Reply Recv. (due 10 days)	Petition Determination	SOTF Case#	Alleged Violations (SFAC)	Individual Respondents	Status	Committee Date	Committee Determination	Task Force Determination	Attorneys Rep.	SF 67.21(f) Order	SF 67.35 Order	CPRA Mandamus Order
3 City Attorney	72056	Disclose Email, in native format, with metadata	Incomplete	2019-05-09	2019-08-26	Denied	19044	67.21, 67.26, 67.27	Herrera, Coolbrith	Pending Full SOTF	2019-08-20	3.0 Records are public.					
4 Mayor	72902	Disclose Calendars, in native format, with metadata	Incomplete	2019-05-15	2019-09-06	Unclear response in next pending in part.	19047	67.21, 67.26, 67.27	Breed, Heckel	Pending Full SOTF	2019-08-20	3.0 Records are public.					
5 Mayor	72902	Calendar records that exceed the Prop. Civ. 26-5 requirements are also public records	Incomplete	2019-08-27	2019-09-06	Unclear response in next pending in part.	See 19047										
6 Mayor	72902	GC 6254(f) is not a valid exemption for Mayor's calendar. Calendar recurrence metadata must be disclosed.	Incomplete	2019-09-06			See 19047										
7 City Attorney	72902	Failure to respond within 10 days to Supervisor of Records petition in Req 72902 / SOTF 19047	Completed after Complaint	N/A			19089	67.21(d)	Herrera, Russi	Pending Committee (rebuttal sent)	2019-09-24						
11 Mayor	76434	Use of secret/personal chat apps for public business. Disclose email and chat, in native format, with metadata, incl. personal devices and accounts	Incomplete	2019-09-26	2019-09-05	Denied in part, pending in part.	19091	67.21, 67.26, 67.27, 67.29-7	Breed, Heckel, Jue, Herrera, Coolbrith, Buss, Phibaur, Crestan, Koller	Pending Committee (rebuttal sent)							
12 Mayor	76434	Public employee email addresses, formatting, timestamps, attachments, images, and more in emails must be disclosed	Incomplete	2019-09-10			See 19091	See above									
13 Police Department	76435	Use of secret/personal chat apps for public business. Disclose email and chat, in native format, with metadata, incl. personal devices and accounts	Incomplete	2019-09-13			Sent	67.21, 67.26, 67.27									
14 Mayor	79117	Disclose past and future Calendars, in native format, with metadata, incl. personal devices/accounts	Incomplete	2019-09-06			See 19047										
16 Dept of Technology	79182	SB 272 / Enterprise Systems catalog, email and calendar system inappropriately excluded as 'enterprise system'; failure to immediately disclose	Incomplete				19094	67.21(k) (CC 6270.5) 67.21, 67.25, 67.26, 67.27	Genill	Pending Reply							
17 City Attorney	79182	SB 272 / Enterprise Systems catalog, email and calendar system inappropriately excluded as 'enterprise system'	Incomplete				19095	67.21(k) (CC 6270.5) 67.21, 67.26, 67.27	Herrera, Coolbrith	Pending Committee (rebuttal sent)							
18 Public Works	79194	Disclose Email and meeting minutes/agendas of Custodians of Records Working Group in native format, with metadata, City employee lobbying of the SOTF	Completed without Complaints					None - Provided .msg, .docx, and .xlsx native files with metadata									
19 Public Works	79356	Disclose Email, in native format, with metadata, incl. personal devices/accounts	Incomplete	2019-09-06			19097	67.21, 67.26, 67.27	Nuru, Spitz	Pending Reply							
20 City Attorney	80172	Sup. of Records does not act as legal counsel; attorney-client privileged and must be disclosed	Incomplete	TODO			19097	67.21, 67.26, 67.27	Herrera, Coolbrith								
27 Museums of San Francisco	79989	FAMSF/FAMF/COFAM relationship - City electronic Public Records stored on or re: non-profile private property must be disclosed	Incomplete	2019-09-12			TODO	67.21, 67.29-6, 67.29-7									