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 made[1] 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

[1] While 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 claimed[2] 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 judicially[4] 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