

IN THE SAN FRANCISCO  
SUNSHINE ORDINANCE TASK FORCE

Anonymous

v.

Paul Henderson, Diana Rosenstein,  
Stephanie Wargo-Wilson, Mary Polk,  
Department of Police Accountability

Reply

Jan. 14, 2020

SOTF No.

**19144**

**REPLY TO RESPONDENTS' RESPONSE**

SOTF should reject all of DPA's response, find all alleged violations, and order full compliance with the Sunshine Ordinance. DPA also misunderstands the law and makes false claims, as explored below.

**1. SFAC 67.26 and 67.27 must be fully enforced against DPA**

The Sunshine Ordinance in its full breadth is regularly applied to the most mundane of emails and other City business. Each and every redaction is justified.

What DPA would have you do is rule that records which are the most contentious of all government records, that is, **records of the unjustified or justified killing of a human being by a government agent**, are beyond the reach of the Sunshine Ordinance's rules, as enshrined by the voters' ballot initiative. DPA's demands to ignore any part of the Sunshine Ordinance for their records are completely backwards.

It is for DPA's records specifically, and more than for almost any other type of City record, that all stakeholders including the public, alleged or confirmed victims, exonerated or guilty officers, all of their families, and others must be absolutely certain that the City has never withheld any information (whether incriminating or exculpatory), except for the minimum exempt portion as required by SFAC 67.26. The public can only be certain when the provisions of SFAC 67.26 and 67.27 are followed. If you do not require that each and every redaction be justified with a

specific provision of law, DPA can be arbitrarily sloppy in redaction (or may attempt to intentionally over-redact) and there can be no trust in their output, with suit against the City being the only recourse.

If DPA's attorneys are already identifying a specific reason in their mind when doing each redaction (as SFAC 67.26 requires), then using, for example, Adobe Acrobat to add the key should be minimal additional work -- Acrobat has a specific feature specifically for redacting with a key or a code. The greater concern of course is that DPA's attorneys do not currently ensure that every redaction has a specific lawful redaction reason that is permitted in San Francisco.

This is not a merely theoretical concern. Consider our similar complaint *SOTF 19121 Anonymous v Police Commission, et al.* - the Police Commission, like DPA, refused to provide any specific justifications at the initial time of response. We alleged approximately 54 unlawful redactions or unlawfully redacted entire documents, of which the Police Commission admitted, prior to any SOTF hearing, that approximately 38 were withheld improperly, in many cases not only un-redacting the specific redaction we challenged, but actually un-redacting the entire document.

DPA falsely stated (emphasis mine) "...the requester argues that citing Penal Code § 832.7 is not enough because there are "**dozens of exemptions.**" Not true. Our complaint said PC 832.7 has "numerous subdivisions." DPA mis-quoted our description of GC 6254, not PC 832.7.

## **2. Exemptions based on Public Interest Balancing Tests are Prohibited**

DPA falsely claimed that (emphasis mine): "The DPA is producing the files under S.B. 1421, which, specifically **requires** the following redactions: ... - And finally, where, on the facts of the particular case, the public interest served by not disclosing the information clearly outweighs the public interest served by disclosure of the information. Penal Code § 832.7 § (b)(6)."

Wrong. While PC 832.7(b)(5)'s subdivisions are **mandatory** exemptions, PC 832.7(b)(6) is a **permissive** exemption, not a mandatory exemption. Let's examine Penal Code § 832.7 § (b)(6) itself (emphasis mine):

"Notwithstanding paragraph (5), an agency **may** redact a record disclosed pursuant to this section, including personal identifying information, where, on

the facts of the particular case, the public interest served by not disclosing the information clearly outweighs the public interest served by disclosure of the information."

Because PC 832.7(b)(6) is a permissive public-interest balancing test exemption, not a mandatory one, SFAC 67.24(g,i) can and does prohibit the use of this exemption in San Francisco.

DPA later states: "But on a macro level, the peace officer personnel records are disclosable because of S.B. 1421, and S.B. 1421 states that the "public interest" balancing test should be applied" Where is this "should" exemption in the law? PC 832.7(b)(6) says "may redact." We hope DPA will retract these spurious claims from the SOTF.

No compromise that weakens the absolute prohibition in SF on the public-interest balancing test exemption is possible. This prohibition avoids the problem seen outside SF of California agencies arbitrarily withholding information they would rather not let the public see, until someone sues, which governments rely on as being an expensive and difficult barrier. That is why it is banned in SF by the will of the voters.

### **3. Complaint Must Proceed in a Public Hearing**

Meet and confers are not specified anywhere in the Sunshine Ordinance as a required process for a records requestor or complainant to use. The public hearing process of the SOTF is far preferable to the meet and confer because it is transparent to the public. In the SOTF process, everything that both the DPA and we state is permanently on the record and public, as it should be. Anyone in the public can analyze and challenge our propositions themselves. Private negotiations avoid public scrutiny.

The DPA must make all of its arguments in writing and at oral argument before SOTF, and in public. We too will respond publicly.

### **4. Other Issues**

While the DPA has produced 11,000+ pages to us, nearly all of these are copies of records already produced to others. This is not labor performed on my account or some herculean efforts performed after the date of my request.

The Sunshine Ordinance is not optional, a best practice, or a mere guideline, as the City repeatedly attempts and fails to convince SOTF. The public's rights cannot be compromised away by the ACLU, me, or anyone else. Neither the ACLU nor any particular media organization can be permitted any privileged position with regards to Sunshine, and their desires are no more important than any other member of the public, each of whom possesses an independent right of public access.

DPA apparently believes immediate disclosure requests require the requestor to state a purpose for immediate disclosure. This has no basis in SFAC 67.25.<sup>1</sup> As the Task Force has repeatedly held, an IDR is defined solely by formatting requirements. DPA is free to declare maximum deadlines in accordance with the law.

Finally, attacks by the City's attorneys against me or my methods, including making false claims about the content of my complaints, are nothing new and have gone on for months by other agencies, and have no bearing on DPA's compliance with the law. They are a method to distract from the City's blatant non-compliance.

We will continue to enforce the lawfully maximum level of transparency against DPA as required by every Sunshine ordinance, CPRA statute, and constitutional provision, as we have done for every other City agency.

Every record, every request, every requestor, every time must get the full Sunshine protection. That is the public's right.

NOTE: Nothing herein is legal, IT, or professional advice of any kind. The author disclaims all warranties, express or implied, including but not limited to all warranties of merchantability or fitness. In no event shall the author be liable for any special, direct, indirect, consequential, or any other damages whatsoever. The digital signature, if any, in this email is not an indication of a binding agreement or offer; it merely authenticates the sender. Please do not include any confidential information, as I intend that these communications with the City all be disclosable public records.

Respectfully submitted,  
ANONYMOUS  
Complainant/Petitioner

---

<sup>1</sup> "The person seeking the information need not state his or her reason for making the request or the use to which the information will be put, and requesters shall not be routinely asked to make such a disclosure." SFAC 67.25(c)